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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-6351

DANIEL A. DONOVAN, CHARLES BRENNICK and JOHN BRENNICK, Co-Partners doing business under the trade name and style of DANIEL A. DONOVAN d/b/a NEW FAIRVIEW HALL CONVALESCENT HOME,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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DANIEL A. DONOVAN, CHARLES BRENNICK and JOHN BRENNICK, Co-Partners doing business under the trade name and style of DANIEL A. DONOVAN d/b/a NEW FAIRVIEW HALL CONVALESCENT HOME,

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NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Daniel A. Donovan, Charles Brennick and John Brennick, Co-Partners doing business under the trade name and style of Daniel A. Donovan, d/b/a NEW FAIRVIEW HALL CONVALESCENT HOME (hereinafter referred to as "the Petitioner" or "the Employer"), respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on August 7, 1975.

Opinions Below

The opinion of the Court of Appeals is not yet officially reported. It is annexed as Appendix A, pp. 1a-15a. The

decision and order of the National Labor Relations Board, is reported at 206 NLRB No. 108, and is annexed as Appendix C, pp. 18a-30a. Excerpts from the decision of the Administrative Law Judge (hereinafter referred to as "the Judge") are annexed as Appendix D, pp. 31a-63a.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Questions Presented

1. Should the benefit of a remedial bargaining order which might otherwise be appropriate under this Court's decision in *N.L.R.B.* v. *Gissel Packing Company,* 395 U.S. 575 (1969), be withheld from a union which evidences a total disinterest in enforcing its representation rights through the peaceful legal processes provided by the National Labor Relations Act by resorting to and encouraging the use of violent tactics to compel their grant?
2. Should the standard for determining whether to withhold a remedial bargaining order be a qualitative analysis of the nature, extent and effect of the union's misconduct on the Section 7 rights of employees and *not* a quantitative balancing of the comparative wrongdoing of the employer and the union?
3. Did the Second Circuit err in sanctioning the Board's abandonment, without explication, of its own standard, as enunciated in *Laura Modes Company,* 144 NLRB 1592 (1963) and *Allou Distributors, Inc.,* 201 NLRB 47 (1973), for determining the appropriateness of withholding a bargaining order?

Statute Involved

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. §151 *et seq.* (hereinafter referred to as "the Act"), are annexed as Appendix E, pp. 64a-66a.

Statement of the Case

This case presents a question critical to the administration of the Act left undecided by this Court in *Gissel, supra,* and its progeny, i.e., whether the benefit of a remedial bargaining order should be withheld from a union where, as here, it engaged in wanton, unprovoked violence, coercion and intimidation in derogation of the Board's statutory processes and the Section 7 rights of the very same employees it seeks to represent.

The Petitioner owns and operates a proprietary nursing home and extended care facility in New Haven, Connecticut.

On March 1, 1971, Local 1199, Drug and Hospital Union, a/w National Union of Hospital and Nursing Home Employees, Retail, Wholesale and Department Store Union a/w AFL-CIO (hereinafter referred to as "the Union"), demanded recognition and, thereafter, on March 4, 1971, filed a petition for an election.

On March 5 and 25 and April 14, 1971, the Union engaged in a series of unprotected work stoppages ("quickie" strikes) at Petitioner's facility.

Commencing on May 6, 1971 and continuing to September 8, 1971 the Union engaged in a strike[1] marked by extensive

---

[1] The Judge found and the Board affirmed that the strike ensued in protest over the lawful discharge of an employee and was not in any way precipitated or prolonged by any antecedent unfair

and pervasive acts of violence, coercion and intimidation: Union Agent Brown charged through the front doors of the facility with fists flying as he and others pushed, shoved and bulled their way inside; striking employees Linda Alger and Mary Jane Fazzino beat upon and pummelled nonstriking employee Genevieve Cicarelli in the driveway of her home immediately after Fazzino smashed the rear windshield of Cicarelli's car with a rock; Brown menaced nonstriking employees with a tire iron and threatened to break the front windshield of the car in which they were sitting; Brown threatened to break nonstriking employee Kirshneur's legs; Brown threatened to break nonstriking employee Armstrong's legs; striking employee Tierney, in the presence of Brown, threatened to break nonstriking employee Bob Seymour's arms and legs; striking employee Brenda Alger threatened to break Cicarelli's legs; Picket Captain Dean threatened to blow up the facility; Brown and striking employees threatened Cicarelli with personal injury at her residence;[2] striking employees threatened Cicarelli and nonstriking employee Sein with physical harm at the facility; Brown threatened to damage nonstriking employee Lee's car and home;[3] striking employees threatened Armstrong with physical injury at her residence; Union Agent Ciulla threatened to cause further damage to nonstriking employee Rich's car;[4] Union Agent Morico attempted to run a management representative and a nonstriking employee off the road; Union Agents Seelig and

labor practices. Accordingly, the Union's misconduct did not take place in the context of an unfair labor practice strike. (Appendix C, p. 19a; Appendix D, pp. 57a-58a.)

[2] A rock was thrown through Cicarelli's porch window as well as through the windshield of her car.

[3] Thereafter, Lee's house windows were broken and the tires on her cars punctured.

[4] Prior thereto, Rich's car was splattered with paint.

Brown recklessly pursued Daniel Donovan and a nonstriking employee through the streets of New Haven, Connecticut; Union Agents repeatedly followed and surveilled management representatives and nonstriking employees as they went to and from the facility; and Union Agents, together with striking employees and outsiders, engaged in extensive mass picketing at the Employer's facility and not only beat upon the cars of nonstriking employees and management representatives with their fists and, in some cases, flashlights, but also rocked them back and forth and threw stones at them.[5] (Appendix D, pp. 31a-58a, 62a-63a.)

On May 20, 1971, Petitioner filed an unfair labor practice charge against the Union. On June 30, 1971, the Regional Director approved the execution of an informal settlement agreement over the Employer's objection.

Notwithstanding the settlement, the Union again resorted to violence.

Accordingly, the Petitioner filed additional unfair labor practice charges. The Regional Director found merit in these charges and thereupon set aside the informal settlement agreement and issued a consolidated complaint.

On November 30, 1971, the Union and the Regional Director entered into a formal stipulation of settlement providing for the consent entry of a Board Order and a Court Decree.[6]

On May 7, August 30, and October 7, 1971, the Union filed charges against the Petitioner. A complaint issued and a trial was held.

[5] As to other Union and employee misconduct during the strike, see Appendix D, pp. 31a-58a, 62a-63a.

[6] On April 17, 1972, a judgment enforcing the Board's order was entered in the United States Court of Appeals for the Second Circuit.

The Judge found that the Petitioner had committed unfair labor practices for which a bargaining order was, under ordinary circumstances, appropriate under this Court's decision in *Gissel, supra.* However, the Judge recommended that, in view of the nature and extent of the Union's misconduct and the effect of this misconduct on employee rights, a bargaining order be withheld in accord with *Laura Modes Company, supra,* and *Allou Distributors, Inc., supra.*[7]

On October 30, 1973, the Board issued its decision and order, affirming in relevant part the findings of fact and conclusions of law made by the Judge, but disagreeing with respect to remedy. The Board readily conceded that "the matter [was] not altogether free from doubt" but nevertheless held that the Judge had erred in withholding a remedial bargaining order. In so doing, the Board did not consider the nature, extent and effect of the Union's violence and misconduct, but, rather, apparently resorted to a superficial balancing test.[8]

The Employer petitioned the United States Court of Appeals for the Second Circuit to review and set aside the Board's order. On December 14, 1973 the Board cross-petitioned for enforcement of its Order.

On July 25, 1975, the Second Circuit issued its decision, granting enforcement of the Board's order. Judgment was entered on August 7, 1975.

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[7] See Appendix D, pp. 58a-63a.

[8] Counsel for General Counsel in oral argument before the Second Circuit acknowledged that the Board had balanced the Union's misconduct against that of the Employer.

Reasons for Granting the Writ

1. The decision below distorts the rationale of this Court's decision in *Gissel.*

a. *The decision below parroted the language of* Gissel *but ignored its rationale.*

Gissel makes clear that a bargaining order is not only designed to remedy past employer interference with the Board's election process and deter future employer misconduct, but also—and most importantly—*to protect and effectuate the Section 7 rights of employees.*

Indeed, in the typical *Gissel* case, where a union possesses cards from a majority of employees and the employer commits unfair labor practices seriously impeding the election process, all three salutary objectives will be achieved by the bestowal of a remedial bargaining order.

However, this is not a typical *Gissel* case. Here, the Union perpetrated extensive misconduct of a serious nature which trammeled employee Section 7 rights. In such circumstances a bargaining order may very well remedy past employer interference with the election process and deter future employer misconduct. But, can it be gainsaid that such an order will truly *protect and effectuate employee rights?* We hardly think so.

Here, both the Board and the Second Circuit applied *Gissel* by rote. They found that the twin predicates of a *Gissel* order—cards and serious employer unfair labor practices—were present and concluded that, as a matter of course, a bargaining order was required. What they failed to do was to analyze the nature, extent and effect of the Union's misconduct on employee rights. It is only in this way that it may properly be determined whether employee rights will be best protected by either the grant-

ing or the withholding of a bargaining order. The granting of a bargaining order in the instant case adheres to the form but pays lip service to the *Gissel* rationale. Far from effectuating employee sentiment, such an order simply benefits the perpetrator of serious misconduct—not the employees against whom such heinous wrongdoing was committed.

b. *The decision below sanctions the use of a wholly improper balancing test for determining whether a bargaining order should be withheld.*

The Court of Appeals, in affirming the Board, stated:

> ". . . (the Board) balanced the Union's illegal activities during the strike against the Company's actions both before and after the strike, measuring, as was its duty, the effect of the Company's violations against the gravity of the Union's misconduct in deciding whether a bargaining order was appropriate." [9]

Balancing is not a proper standard under *Gissel,* to determine whether an otherwise appropriate bargaining order should be withheld. Indeed, the reliance placed upon a balancing test by the Board and the Court is a misapplication of the *Gissel* rationale. *Gissel* mandates that the Board analyze the nature, extent and effect of employer unfair labor practices on employee rights in assessing whether or not a bargaining order is appropriate. Thus, *Gissel* requires the Board to focus solely on employer misconduct. The union's improprieties are wholly irrelevant and immaterial to this determination.

Conversely, the determination to withhold a bargaining order, otherwise appropriate under *Gissel,* should be predicated solely upon the extent and nature of the union's

[9] See Appendix A, p. 10a.

misconduct and violence and its resultant effect upon employee rights. Employer misconduct, although relevant in determining if a bargaining order is warranted initially, has no bearing on the issue of withholding a bargaining order. The effect of flagrant union misconduct on employee rights is not in any way mitigated or rendered less severe simply because the employer likewise committed serious unfair labor practices.

The balancing standard apparently adopted by the Board and sanctioned by the Court below merely assesses relative culpability as between two parties—the employer and the union. Such balancing does not take into account that there is a third party intimately concerned with the granting or withholding of a bargaining order—the employees, whose rights are of paramount importance. What this test ignores —indeed this is its fatal defect—is that union misconduct, although possibly less extensive than the employer's, nevertheless can be of such a severe nature that employees' rights may, for all intents and purposes, be effectively vitiated and frustrated.

Under the circumstances presented herein, the decision below not only fails to further the purposes of the Act, but abandons those individuals who are coerced and places them in the maws of those who have so deliberately and viciously violated their rights.

c. *In view of the Union's misconduct herein, the cards on which the bargaining order is predicated may not be considered a reliable expression of employee sentiment.*

Under the principles of *Gissel,* a bargaining order is otherwise appropriate if the union has a card majority and the employer engages in serious unfair labor practices which make the holding of a fair election slight or even impossible. In so holding, the Supreme Court stated that

"where an employer engages in conduct disruptive of the election process, cards may be the most effective—perhaps the only—way of assuring employee choice." [10]

Thus, the essence of the bargaining order is to give effect to and protect employee sentiment expressed through cards where the employer has committed serious unfair labor practices which have jeopardized the holding of a free election.

However, in cases where, as here, the Union has engaged in gross misconduct, threats, coercion and violence directed at the very same employees it seeks to represent, after cards have been obtained, such cards are no longer reliable as indicators of employee sentiment.

2. The decision below presents an issue of critical importance in the administration of the Act representing the only remaining question left unanswered by *Gissel*.

Gissel determined that a bargaining order was an appropriate remedy where a union possesses a card majority and the employer has committed serious unfair labor practices.

However, *Gissel* did not answer the questions at the other end of the spectrum:

(1) whether a compulsory bargaining order may be foisted upon an employer who rejects a union's card-based bargaining demand while at the same time refraining from committing unfair labor practices

— and —

(2) whether an otherwise appropriate bargaining order should be withheld from a union which evi-

[10] *Gissel, supra* at pp. 602.

dences a total disinterest in enforcing its representation rights through the peaceful legal processes provided by the Act by resorting to and encouraging the use of violent tactics to compel their grant.

In *Linden Lumber, Division of Summer & Co.*, 419 U.S. 301 (1974), this Court answered the first question. Thus, the only remaining question left unanswered by *Gissel* is the one presented herein.

A resolution of the issue presented in this case by this Court would complete the *Gissel* spectrum.

The necessity for review by this Court is underscored by the Board's bestowal of a bargaining order upon the Union while acknowledging that "the matter [was] not altogether free from doubt".[11]

3. The Court below erred in sanctioning the Board's arbitrary, unexplained and unprecedented departure from the *Laura Modes* test for determining whether a bargaining order should be withheld.

Prior to this case, the standard utilized by the Board in determining whether a bargaining order should be withheld was a qualitative assessment of the nature and extent of the union's misconduct and its effect upon employee rights, viewed wholly independently from employer unfair labor practices. This standard was first announced by the Board in *Laura Modes Company, supra,* and was uniformly followed in subsequent cases. See *Allou Distributors, Inc., supra,* and *Artcraft Mantel and Fireplace Co.*, 174 NLRB 737 (1969).

In the instant case, the Board has made an arbitrary, unexplained and unprecedented departure from the *Laura*

[11] See Appendix C, p. 23a.

Modes test and has imposed a balancing test for which there is no support under either the Act or prior case law.

The Second Circuit stated in *N.L.R.B.* v. *General Stencils, Inc.*, 438 F.2d 894, 76 LRRM 2288 (2nd Cir. 1971):

> "Bargaining orders are not immune from the great principle that like cases must receive like treatment. While the Board has wide discretion in framing remedies, the agency has a correlative duty to explain its imposition of a remedy in one case and its failure to do so in a seemingly similar or even stronger one on a basis reviewing courts can understand." 76 LRRM at 2296 (Footnote omitted).

The principle espoused therein is equally applicable to situations where the issue in question is the withholding of a bargaining order. The Board in this case was under an affirmative duty to explain why the remedy of a bargaining order was withheld in *Laura Modes, supra,* but was not withheld here. This conclusion is particularly compelling since the Union misconduct herein was (1) much more serious, violent and pervasive than that in *Laura Modes;* and (2) was in no way precipitated by employer unfair labor practices, as was the case in *Laura Modes.*

Quite inexplicably, the very same Court which issued *General Stencils* sanctioned the Board's arbitrary departure from its long established standard. The decision below allows the Board to give unlike treatment to like cases. Accordingly, review by this Court is necessary to determine the propriety of such action.

4. The decision below encourages union violence and misconduct in derogation of the policies of the Act and the 1974 Hospital Amendments.

The National Labor Relations Act is intended to provide a peaceful means of settling labor disputes so as to promote industrial harmony and the uninterrupted flow of commerce. Sanctions are imposed upon employers and unions alike who disregard the peaceful legal processes provided by the Act.

The Second Circuit's enforcement of the Board's bargaining order and its espousal of a balancing test in the instant case are an encouragement to all unions to abandon the peaceful processes provided by the Act and to resort to a campaign of violence and intimidation in order to secure their recognitional objectives.

This subversion of the basic purposes of the Act is particularly striking in the instant case involving a proprietary nursing home. The 1974 Amendments to the Act and the legislative history of those amendments reflect a particular concern for maintaining industrial peace in the healthcare industry.

Yet, the Second Circuit has rewarded a Union which engaged in an unprovoked, protracted and violent strike against a healthcare institution by conferring upon that Union the benefit of a bargaining order. The decision below ignores the special concern of Congress for the healthcare industry and rewards the wrongdoer. It thus stands as an encouragement to this and other unions active in the industry that the statutory restrictions upon their activities may be safely and indeed profitably ignored. A decision with these serious consequences warrants review by this Court.

CONCLUSION

For the foregoing reasons it is respectfully requested that this Court issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Dated: October 27, 1975

APPENDIX

APPENDIX A

(Opinion of the Court of Appeals in Case Nos. 73-2642 and 73-2823 Dated July 25, 1975)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 552—September Term, 1974
1343

(Argued May 16, 1975 Decided July 25, 1975)

Docket No. 73-2642, 73-2823

DANIEL A. DONOVAN, CHARLES BRENNICK and JOHN BRENNICK, Co-Partners doing business under the trade name and style of DANIEL A. DONOVAN d/b/a NEW FAIRVIEW HALL CONVALESCENT HOME,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Before:

SMITH and OAKES, *Circuit Judges,*
and JAMESON, *District Judge.**

Proceeding on petition to review and cross-petition to enforce National Labor Relations Board order which found that the employer violated Section 8(a)(1) of the National Labor Relations Act by coercive actions intended to undermine the Union's organizational effort and that the em-

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* Of the District of Montana, sitting by designation.

ployer violated Section 8(a)(3) and (1) of the Act by refusing to reinstate economic strikers. Petitioners also contest the propriety of a remedial bargaining order issued by the Board. Held, that employer's violations of Section 8(a)(1) and (3) of the Act were substantiated in the record, and that under the totality of the circumstances in this case, the issuance of a bargaining order was proper.

PATRICK VACCARO, JACKSON, LEWIS, SCHNITZLER & KRUPMAN, New York, N.Y. (DAVID KREITZMAN, JOSEPH F. LEGNARD, of counsel), for Petitioners.

JAY E. SHAKIN, Attorney, NLRB, Washington, D.C.; PETER G. NASH, General Counsel; JOHN S. IRVING, Deputy General Counsel; PATRICK HARDIN, Associate General Counsel; ELLIOT MOORE, Deputy Associate General Counsel, for Respondent.

OAKES, *Circuit Judge*:

This case presents the question whether a union's coercive conduct can preclude it from the benefits of a *Gissel* bargaining order (*NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969)) made as a result of an employer's § 8(a)(1) and § 8(a)(3) conduct (notes 1 and 2 *infra*). The petitioners in this case, Daniel Donovan, Charles Brennick and John Brennick, are co-partners doing business under the trade name "Daniel A. Donovan d/b/a New Fairview Hall Convalescent Home" (the Company). The Company, a licensed proprietary nursing home and extended care facility located in New Haven, Connecticut, appeals from a decision of the National Labor Relations Board which found (1) that the Company

violated § 8(a)(1)[1] of the National Labor Relations Act (the Act), 29 U.S.C. § 158(a)(1), by certain coercive action intended to undermine employee attempts to organize and (2) that the Company violated §§ 8(a)(3)[2] and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1) with respect to the reinstatement of strikers. The Board issued an order requiring the Company to cease its unfair labor practices and to make whole for any loss of wages the employees discriminated against. In addition, the Board found that the Union had at all relevant times valid authorization cards from a majority of the Company's employees in an appropriate bargaining unit and that the Company's refusal to bargain with the Union constituted a violation of §8(a)(5)[3] and (1) of the Act, 29 U.S.C. § 158(a)(5), justifying under the circumstances the issuance of an order requiring the Company to bargain with the Union without an election. *See generally NLRB* v. *Gissel Packing Co., supra.*[4]

Petitioners' principal contention is that in spite of any misconduct by the Company, the Union's organizational activities were marked by such extensive violence, coercion

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[1] Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), provides that:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain or coerce employees in the exercise of [organizational rights].

[2] Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), prohibits discrimination in hiring or firing on the basis of union membership and also prohibits any "term or condition of employment to encourage or discourage membership in any labor organization."

[3] Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), makes it an unfair labor practice for a company to refuse to bargain collectively with the representative of the employees.

[4] Petitioners are before this court pursuant to Section 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f). The Board has cross-applied for enforcement of its order.

and intimidation that the issuance of a bargaining order was an inappropriate remedy. Under petitioners' view, the Board has allowed a bargaining order in favor of a union which chose to bypass the peaceful processes of the Act and to resort to illegal and disruptive activity to further its organizational aims. The argument is that issuing a bargaining order encourages future union violence. The administrative law judge who heard the case concluded with the Company that the Union's misconduct was so substantial that the remedial powers of the Board should not have been exercised through the issuance of a bargaining order. The Board, however, declined to adopt the law judge's recommendation.

We turn to the facts surrounding the Union's attempts to organize the Company, upon which the case turns. The Union held its first organizational meeting in February, 1971, with only six employees present. By March 1, however, the Union had obtained authorization cards from 39 of the 58 Company service and maintenance employees. At that time, the Union asked the Company to recognize it as a bargaining agent and offered to submit its card majority to verification by a neutral party. The Company gave no immediate response. On March 2, the Union mailed 30 authorization cards to the NLRB office in Boston and filed for an election. On March 11, after another request by the Union for recognition, the Company stated that it doubted the validity of the authorization cards and that it would await results of an election before recognizing the Union as a bargaining agent.

Between mid-February and May 6, 1971, however, the Company engaged in a concerted effort to undermine the Union's organizational activities. The Company threatened employees concerning the loss of their jobs if they continued to support the Union,[5] solicited employees to negotiate grievances directly with the Company rather than through the Union,[6] coercively interrogated employees[7] and in at least one instance withheld a raise[8] to a Union supporter.[9]

[5] A Company shift supervisor, Lane, often questioned the employees about the Union, *cf. Retired Persons Pharmacy* v. *NLRB*, No. 74-1651 (2d Cir. July 2, 1975), slip op. 4599, 4608-11, and on several occasions threatened employees that they were "taking a chance" with their jobs because of their union affiliation. He made repeated suggestions to Union organizers that the Company could "find reasons" to fire everyone connected with the Union, and on at least one occasion indicated that the Company had a spy in the Union ranks who would help to arrange the firings. Such threats are clearly unfair labor practices. *See NLRB* v. *Hendel Mfg. Co.*, 483 F.2d 350 (2d Cir. 1973); *NLRB* v. *Gladding Keystone Corp.*, 435 F.2d 129, 132-33 (2d Cir. 1970).

[6] On March 5, 1971, the Company's administrator, Shepherd, assembled the employees and charged that the Union was made up of a "bunch of racketeers," and that the employees should come to management first if they had problems and that if a union was important to them, management could get them a union. Shift supervisor Lane also suggested to the employees that they should go directly to management with their grievances. Another management representative, Greenwood, also made suggestions that the employees bypass the Union in favor of management. Such conduct interfered with the employees' Section 7 rights. *See NLRB* v. *Marsellus Vault & Sales, Inc.*, 431 F.2d 933, 937 (2d Cir. 1970).

[7] The record shows repeated instances where the administrator, Shepherd, food service manager Distasio, and director of nurses, Boecker, questioned employees about their union affiliation, asked them to provide information to the Company concerning the Union's organizational efforts and in general expressed hostility toward membership in the Union. *See NLRB* v. *Marsellus Vault & Sales, Inc., supra* n.6.

[8] Food service manager Distasio told one of his employees that he "wouldn't get a pay raise as long as this union stuff was going on." *See NLRB* v. *Gladding Keystone Co., supra* n.5.

[9] There were also a number of minor § 8(a)(1) violations by Company representatives, most of which involved threats of the loss of benefits (coffee breaks, lunch periods, etc.) if the Union were allowed into the Company's facility.

Appendix A

The trial judge's summary of the Company's pervasive misconduct between February and May 6 covers some 30 pages of an extensive opinion and demonstrates a complete disregard on the part of the Company for the protected rights of its employees. The Company's activities, in short, followed a clearcut pattern of coercion and intimidation not limited to isolated events. In this court, the Company has, in effect, abandoned any effort to contest the findings of the trial judge and the Board[10] as they relate to the Company's misconduct. Rather, the Company relies wholly upon the Union's own misconduct as precluding the issuance of a bargaining order.

On May 4, 1971, the Company suspended employee Louise Tierney, a union activist, for circulating a leaflet falsely stating that the brother of petitioner Donovan had attempted to bribe her to cease her union activity.[11] Thereafter, on May 6, the Union began a strike in her support which lasted until September 8.[12] At least 51 unit employees

[10] When before the Board, the Company filed 303 exceptions to the decision of the administrative law judge.

[11] The administrative law judge found that the alleged bribe had not been offered.

[12] Since the dismissal of employee Tierney was eventually found to be justified because there was no bribe offered, the Board found the Union's strike to be an economic strike rather than an unfair labor practice strike. This distinction has particular importance with respect to the reinstatement of strikers. Unfair labor practice strikers are entitled to reinstatement with back pay even if they have been replaced during the strike. *See Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 278 (1956). Economic strikers may request reinstatement through their union, and, once that request is made, the employer must offer reinstatement to those employees for whom there are available positions. *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *The Laidlaw Corp.*, 171 NLRB No. 175 (1968), *enf'd*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). *See generally H. & F. Binch Co.* v. *NLRB*, 456 F.2d 357 (2d Cir. 1972).

Appendix A

did not perform work or services for the Company during the strike. While the strike ended in September, the Company's coercive activity continued against those who had supported the Union. As found by the law judge, the Company had jobs for at least 18 strikers when the strike ended, but engaged in a purposeful pattern of discrimination by refusing to reinstate the 18 either immediately or when vacancies arose and in one case by refusing to reinstate a striker to her former job. *See generally NLRB* v. *Fleetwood Trailers Co.*, 389 U.S. 375 (1967); *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

The Company further undermined the Union's strength when three months after the strike it awarded for the first time Christmas bonuses which amounted to between $3 and $15 depending on length of service to the unit employees. Petitioner Donovan could offer no credible explanation for the sudden Christmas bonus leading the trial judge to conclude that the bonus was motivated by a desire to undermine the Union's bargaining power, and as such constituted a clear violation of § 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1).[13] *NLRB* v. *Exchange Parts Co.*, 375 U.S. 405 (1964); *NLRB* v. *Orleans Manufacturing Co.*, 412 F.2d 94, 96-97 (2d Cir. 1969); *NLRB* v. *Yokell*, 387 F.2d 751, 755-56 (2d Cir. 1967).

In the course of the strike, a number of Union members engaged in incidents involving mass picketing, threats, assaults and some property damage. The administrative law judge summarized his findings as follows:

[13] The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.
NLRB v. *Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

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Union Representative Brown accompanied by striking employees forcibly entered the Employer's nursing home during the strike; Union Representative Brown accompanied by striking employees and others followed non-striking employees to and from work and repeatedly threatened them with physical harm and property damage; striker Dean, also a picket captain for the Union, called in a bomb-scare to the nursing home during the strike; Union Representative Ciulla threatened non-striking employee Rich with property damage; Union representatives participated in mass picketing, blocking the ingress and egress of non-strikers and banging on cars; Union Representative Morico kicked a car and cursed at and threatened management and, thereafter, attempted to run one of the Company's representatives off the road during the strike; striker Dean threw small rocks or pebbles at a supervisor's car attempting to leave the facility during the strike; strikers Mary J. Fazzino and Linda Alger assaulted a non-striker and damaged her property; and Union representatives threatened, followed and harassed management's representatives as they attempted to enter and leave the facility. And, as found *supra*, . . . even before the strike Union representatives repeatedly attempted to enter the Employer's facility without permission.

On the basis of these facts, the judge concluded as follows, borrowing the language of *Laura Modes Co.*, 144 NLRB 1592, 1596 (1963):

> [I]n the particular circumstances of this case the policies of the Act and the legitimate interests of the public and the parties will best be served by denying the

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> Union the right to invoke our statutory processes in aid of a demand for recognition as bargaining representative of Respondent's employees unless and until it demonstrates its majority among those employees through the Board's election procedures.

The Board concluded, however, that the misconduct involved "only a handful" of the striking employees and, except for three instances of mass picketing and a threat of like conduct in the future made in August, 1971, was engaged in only during the early weeks of the strike. The Board said that the

> misconduct consisted of some threats and name calling directed at nonstriking employees, two instances of car following, two or three instances of hitting nonstrikers' cars with fists and pebbles or pieces of gravel as they passed through the picket line, unsuccessful attempts to block entrance to the Respondent's premises, one instance of property damage inflicted by [a] striker throwing a bottle on the windshield of a nonstriker's automobile, and one instance of attempted forcible entry which was successfully blocked by Respondent with the help of police. There were no physical assaults upon employees or supervisory personnel, and only one incident of actual property damage. The nonstriking employees continued to report to work and were able to enter Respondent's premises without harm.

Viewing the case in perspective, the Board found a few instances of misconduct by a relatively small proportion of strikers, which occurred only sporadically in the context of a four month long strike and against a background

of the Company's frequent and recurring unfair labor practices. It therefore concluded that "the extraordinary sanction of withholding an otherwise appropriate remedial bargaining order" would not be employed. The Board, expressing reluctance to deprive a substantial group of employees of the benefit of collective bargaining because of the misconduct of "a few miscreants," therefore issued a *Gissel* bargaining order. *See* Carson, *The* Gissel *Doctrine: When a Bargaining Order Will Issue,* 41 Fordham L. Rev. 85 (1972).

In taking this position, the Board did not "mischaracterize" the Union's illegal activity as petitioners charge. Rather, it balanced the Union's illegal activities during the strike against the Company's actions both before and after the strike, measuring, as was its duty, the effect of the Company's violations against the gravity of the Union's misconduct in deciding whether a bargaining order was appropriate. *See generally NLRB* v. *World Carpets of New York,* 463 F.2d 57, 62 (2d Cir. 1972) ("minimal" misconduct by employer weighed against violence by union officials intimidating employees did not justify bargaining order).

The teaching of *NLRB* v. *Gissel Packing Co., supra,* is that it is within the Board's power to issue a bargaining order in a situation where a company's unfair labor practices are of a kind that interfere with the election process and tend to preclude the holding of a fair election. The remedy of a bargaining order is appropriate (1) where the unfair labor practices are so pervasive that there is no other way of remedying their effect or (2) when the unfair labor practices, while less substantial, are such that "the possibility of erasing the effects of past practices and of ensuring a fair election . . . is slight and that employee sentiment, once expressed through cards, would, on balance [be] better protected by a bargaining order." 395 U.S. at 614-15.[14]

The law judge apparently felt that a fair election was still possible, in spite of the Company's misconduct, but even this is somewhat unclear since the judge's recommendation to deny the bargaining order was apparently based much more on his reluctance to benefit a Union which he viewed as responsible for pervasive misconduct than upon an explicit finding concerning the likelihood of a fair election.

The Board explicitly found that the prospect of having a fair election was doubtful if not impossible and that this was due solely to the Company's unlawful activity.

> [The Company's] parade of 8(a)(1) violations, and its unlawful grant of bonuses have . . . so indelibly imprinted in its employees' consciousness both the fear of retaliation against legitimate concerted activity and the available rewards for refraining therefrom that no free election can be held here.

On the basis of the record developed by the law judge, the Board's conclusions are supported by substantial evidence. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951). The record is replete with instances of employer misconduct which would have made it difficult if not impossible for a fair election to have taken place. The only real question is the propriety of issuing a bargaining order here regardless of the employer's misconduct. To be sure,

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[14] It was explicitly found by the administrative law judge that "a majority of employees in a unit appropriate for collective bargaining voluntarily and knowingly signed valid Union authorizations designating the Union as their bargaining agent by March 1 and April 7."

there have been instances where this court and others have refused to enforce a bargaining order issued by the Board. In *NLRB* v. *World Carpets of New York, supra,* this court's refusal to enforce a bargaining order rested primarily upon a failure by the Board to demonstrate that the employer's misconduct was substantial enough to have prejudiced the chances for a free election. In *NLRB* v. *M. H. Brown Co.,* 441 F.2d 839 (2d Cir. 1971), this court's refusal to enforce a bargaining order was again precipitated by an absence of substantial violations by the employer. *See NLRB* v. *General Stencils, Inc. (I),* 438 F.2d 894 (2d Cir. 1971) (remanding a case involving a bargaining order for insufficient facts), and *NLRB* v. *General Stencils, Inc. (II),* 472 F.2d 170 (2d Cir. 1972) (refusing to enforce a bargaining order because of insufficient facts showing that a fair election was impossible). *See also NLRB* v. *Gibson Products Co.,* 494 F.2d 762 (5th Cir. 1974); *Peerless of America, Inc.* v. *NLRB,* 484 F.2d 1108 (7th Cir. 1973); and cases cited in Carson, *supra,* at 106-14.

Here, however, the Company's illegal conduct in connection with the Union's organizational efforts amounted to a purposeful attempt to intimidate its employees. The effect of its efforts was the creation of an abiding atmosphere of coercion severely limiting the free choice of employees. It is in just such a situation that the issuance of a remedial bargaining order by the Board is appropriate.

The excesses by the Union in the course of its strike were unwarranted and illegal; they subject it to appropriate remedies under § 8(b), 29 U.S.C. § 158(b). And the inability of the Union better to control its strikers cannot be condoned. But we simply cannot find, on balance, that the Union activity should foreclose the issuance of this bar-

gaining order. Here only four[15] strikers were not reinstated because of their conduct during the strike. They were treated as they should have been. The gravity of their conduct, and that of the other strikers, when balanced against the effect of the employer's violations, shows the Board's determination to be a reasonable exercise of its broad remedial authority. *See NLRB* v. *Gissel Packing Co.,* 395 U.S. at 612 n.32. *Cf.* Carson, *supra,* at 102-05.

The fashioning of remedies is particularly difficult where, as here, the legal standard to be applied involves a balancing test and both sides are shown to have been guilty of misconduct. Ultimately the collective facts when sorted and collated show the Company to be the more guilty party; this together with (1) the existence of valid authorization cards from a majority of the employees in the bargaining unit; (2) a substantially supported finding that a fair election would be impossible; (3) a clear causal link between the Company's substantial misconduct and present inability to conduct a free election; (4) the extensiveness of the Company's misconduct both before and after the strike which indicated a likelihood that such conduct would continue if an election were held; (5) the Union's demonstrated good faith in submitting to the legal process up to the time that the Company refused to recognize the Union's card majority,[16] justifies the bargaining order here. Peti-

[15] The administrative law judge found six strikers to be undeserving of reinstatement. The Board reduced that number to four. *See* text at n.16 *infra.*

[16] In noting this, we in no way condone the Union's later activities. They cannot be said to have been caused by the Company's refusal to bargain, and even if this were the case, that would not justify the Union's illegal conduct. The Union's pre-strike activity is important only inasmuch as it can be contrasted with a situation such as that present in *Laura Modes Co.,* 144 NLRB 1592 (1963),

tioners devote some 40 pages in their brief to a careful fragmentation of each of the alleged instances of Union misconduct, in an effort to show its organizational effort to have been a "vicious campaign of terror." We defer to the Board's approach in refusing to view individual factual incidents apart from their larger framework, and its ultimate resolution of the mixed question whether the Union's activities on the whole were of a kind that should preclude a bargaining order. *Cf. NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 198 (1941); *MPC Restaurant Corp.* v. *NLRB*, 481 F.2d 75, 79 (2d Cir. 1973). *See also*, 4 K. C. Davis, Administrative Law Treatise § 30.04 at 209-10. Rather than begin another round of threats and reprisals we will enforce the Board's order. *Cf. NLRB* v. *The Trading Port, Inc,*. No. 74-2150 (2d Cir. May 26, 1975), slip op. 3743, 3755-56.

Petitioners' remaining claim centers on the reinstatement of two strikers, Izzo and Adorno. The administrative law judge concluded that both were properly denied reinstatement.[17] The Board disagreed. At issue is whether the facts as found by the trial judge and reviewed by the Board constitute the kind of serious misconduct which justifies the denial of reinstatement, *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 256-61 (1939), or merely "rough trivial incident[s]" which, when viewed in the context of a four

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where the Board withheld a bargaining order in a situation where the union evidenced a "total disinterest in enforcing its representation rights through the peaceful legal process provided by the Act."

[17] The Board upheld the administrative law judge's findings that petitioners did not violate § 8(a)(3) and (1) of the Act by refusing to reinstate employees Dean, Betzner, Fazzino and Linda Alger on account of strike misconduct.

month long strike are not of a serious nature, *e.g.*, *NLRB* v. *Terry Coach Industries, Inc.*, 411 F.2d 612 (9th Cir. 1969).

The evidence showed that striker Izzo, together with others tried to prevent a nonstriker (Armstrong) from driving into the Company's grounds, and that Izzo put her head inside Armstrong's car and said, "you know what we do to scabs." Striker Adorno's illegal conduct consisted primarily of being present with a carload of people from the picket lines who went to Armstrong's home with the avowed purpose of talking with her (but were apparently frightened away by the appearance of a relative of Armstrong with a 13-foot boa constrictor wrapped over her shoulders), and eventually issued threats to the nonstriker about crossing the Union picket lines. The Board's conclusion that these strikers were not guilty of conduct sufficiently serious to support the denial of their reinstatement is supported by credible evidence. *NLRB* v. *Hartmann Luggage Co.*, 453 F.2d 178 (6th Cir. 1971). *Cf. Southern Steamship Co.* v. *NLRB*, 316 U.S. 31 (1942) (unlawful sitdown strike by seamen in domestic port).

Petition to review denied; cross-petition to enforce granted.

APPENDIX B

(Judgment of the Court of Appeals for the Second Circuit in Case Nos. 73-2642 and 73-2823 Entered August 7, 1975)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 73-2642, 73-2823

DANIEL A. DONOVAN, CHARLES BRENNICK AND JOHN BRENNICK, CO-PARTNERS DOING BUSINESS UNDER THE TRADE NAME AND STYLE OF DANIEL A. DONOVAN d/b/a NEW FAIRVIEW HALL CONVALESCENT HOME,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

JUDGMENT

Before:

SMITH, OAKES, *Circuit Judges,*
JAMESON, *District Judge.**

THIS CAUSE came on to be heard upon a petition filed by Daniel A. Donovan, Charles Brennick and John Brennick, co-partners doing business under the trade name and style of Daniel A. Donovan d/b/a New Fairview Hall Convalescent Home, to review an order of the National Labor Relations Board issued against said Petitioner, its agents, successors and assigns, on October 30, 1973, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument

* Of the District of Montana, sitting by designation.

of respective counsel on May 16, 1975, and has considered the briefs and transcript of record filed in this cause. On July 25, 1975, the Court being fully advised in the premises, handed down its decision denying the petition to review and granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Second Circuit that the petition for review filed by Daniel A. Donovan, Charles Brennick and John Brennick, co-partners doing business under the trade name and style of Daniel A. Donovan d/b/a New Fairview Hall Convalescent Home, be and it is hereby denied and the said order of the National Labor Relations Board in said proceeding be enforced, and that Petitioner, its agents[,] successors and assigns, abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED that costs shall be taxed against the Petitioner.

J. JOSEPH SMITH
Judge, United States Court of Appeals for the Second Circuit

JAMES L. OAKES
Judge, United States Court of Appeals for the Second Circuit

FILED:

APPENDIX C

(Decision and Order of the National Labor Relations Board in Case No. 206 NLRB No. 108, Decided October 30, 1973)

206 NLRB No. 108

MFP
D—7975
New Haven, Conn.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 1—CA—7643
1—CA—7837
1—CA—7903

DANIEL A. DONOVAN, CHARLES BRENNICK AND JOHN BRENNICK, CO-PARTNERS DOING BUSINESS UNDER THE TRADE NAME AND STYLE OF DANIEL A. DONOVAN d/b/a NEW FAIRVIEW HALL CONVALESCENT HOME

and

LOCAL 1199, DRUG AND HOSPITAL UNION A/W NATIONAL UNION OF HOSPITAL AND NURSING HOME EMPLOYEES, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION A/W AFL—CIO

DECISION AND ORDER

On February 20, 1973, Administrative Law Judge Frank H. Itkin issued the attached Decision in this proceeding. Thereafter, the General Counsel, Charging Party, and Respondent filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor

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Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, except as modified herein.

We agree with each of the Administrative Law Judge's findings relative to Section 8(a)(1) of the Act as detailed by him. In addition, we find that Respondent's promise of a pay increase to employee Stopka during Shep[e]rd's unlawful interrogation of her constituted an additional violation of Section 8(a)(1) of the Act.

We also agree with the Administrative Law Judge's findings, for the reasons stated by him, that Respondent did not violate Section 8(a)(3) and (1) of the Act by suspending and thereafter discharging employee Tierney, and that the strike which was triggered by this discharge was therefore an economic strike. We further agree with the Administrative Law Judge, for the reasons stated by him, that Respondent did not violate Section 8(a)(3) and (1) of the Act by refusing to reinstate strikers Dean, Betzner, Fazzino, and Linda Alger on account of their strike misconduct.

Contrary to the Administrative Law Judge, however, we find that Respondent's refusal to reinstate strikers Adorno and Izzo violated Section 8(a)(3) and (1) of the Act.

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[1] The General Counsel, Charging Party, and Respondent have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3). We have carefully examined the record and find no basis for reversing his findings.

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Adorno's alleged strike misconduct consisted merely of being present with other strikers and union agents at the home of nonstriker Armstrong when Armstrong was threatened by some of the other strikers. Izzo's alleged misconduct consisted of putting her head inside nonstriker Armstrong's automobile and threatening Armstrong when she crossed the picket line. Such conduct, viewed in the context of a lengthy strike and a heated organizing campaign, is not of such a serious character as to render Adorno and Izzo unfit for reinstatement.[2]

We agree with the Administrative Law Judge, for the reasons stated by him, that Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing immediately to reinstate the 18 strikers named in Conclusion of Law 4 and thereafter delaying reinstatement or failing to offer timely reinstatement to these 18 strikers and employee Bernard when vacancies arose. It is well settled that economic strikers are entitled, upon application, to immediate reinstatement to their former or substantially equivalent positions of employment unless such positions have been permanently filled or eliminated or are unavailable.[3]

In addition, an employer is obligated to accord economic strikers preferential status and immediately to reinstate such strikers when their previous or substantially equivalent positions are available.[4] Therefore, we also agree with

[2] *McGwier Co., Inc.*, 204 NLRB No. 87; *Terry Coach Industries, Inc.*, 166 NLRB 560, enfd. 411 F.2d 612 (C.A. 9).

[3] *N.L.R.B.* v. *MacKay Radio and Telegraph Co.*, 304 U.S. 33; *N.L.R.B.* v. *Fleetwood Trailer Co., Inc.*, 389 U.S. 375.

[4] *N.L.R.B.* v. *Fleetwood Trailer Co., supra; N.L.R.B.* v. *Great Dane Trailers*, 366 U.S. 26; *Laidlaw Corp.*, 171 NLRB 1366, enfd. 414 F.2d 99 (C.A. 7), cert. denied 397 U.S. 920.

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the Administrative Law Judge's finding, for the reasons stated by him, that Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate employee Gargiulo to her former or substantially equivalent job, assigning her instead to a more onerous job, and eventually discharging her because she had engaged in protected activities. In addition, we hereby correct the Administrative Law Judge's apparently inadvertent failure to find that Respondent also violated Section 8(a)(3) and (1) of the Act by denying full reinstatement to employees Brenda Alger and Deborah Alger. The evidence establishes that these employees worked 2 days per week prior to the strike, but were offered reinstatement and were reinstated to 1-day-per-week jobs after the strike. Such reinstatement does not constitute "full reinstatement" under the criteria discussed above.

The Administrative Law Judge found, and we agree, that the Union had valid authorization cards from a majority of Respondent's employees in an appropriate unit at all times relevant herein, that Respondent rejected the Union's demands for recognition and, instead, as found above, engaged in pervasive and extensive acts of coercion, restraint, and interference with employee rights intended to undermine the employees' support of the Union. However, he inadvertently failed to find that Respondent thereby violated Section 8(a)(5) of the Act. Based on the facts as found by the Administrative Law Judge, we find that Respondent's refusal to recognize and bargain with the Union in the circumstances here violated Section 8(a)(5) and (1) of the Act.[5]

[5] *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). While Chairman Miller agrees that a bargaining order is an appropriate remedial order herein, he would, for the reasons stated in his sep-

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The Administrative Law Judge further concluded that a bargaining order was inappropriate because of the Union's strike misconduct. We do not agree. The alleged strike misconduct involved only a handful of the striking employees and, except for three instances of mass picketing and a threat of like conduct in the future made in August 1971, was confined to the early weeks of the strike. The alleged misconduct consisted of some threats and name calling directed at nonstriking employees, two instances of car following, two or three instances of hitting nonstrikers' cars with fists and pebbles or pieces of gravel as they passed through the picket line, unsuccessful attempts to block entrance to the Respondent's premises, one instance of property damage inflicted by striker throwing a bottle on the windshield of a nonstriker's automobile, and one instance of attempted forcible entry which was successfully blocked by Respondent with the help of police. There were no physical assaults upon employees or supervisory personnel, and only one incident of actual property damage. The nonstriking employees continued to report to work and were able to enter Respondent's premises without harm.

We do not condone any picket line violence, and the processes of this Board are available to prevent its recurrence, as is evidenced by the 8(b) proceeding herein. But we also are reluctant to deprive a substantial group of employees of the benefits of collective bargaining because of the misconduct of a few miscreants. Here, looked at

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arate concurrence in *United Packing Company of Iowa, Inc.*, 187 NLRB 878, predicate this remedy solely on the extensive 8(a)(1) and (3) violations found herein. He sees no need for, and does not join in, the legal fiction of a separate 8(a)(1) and (5) finding to support such a remedial order.

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in perspective, there were but few instances of misconduct by a relatively small proportion of strikers, which occurred only sporadically in the context of a 4-month long strike and against a background of Respondent's frequent and recurring unfair labor practices. Viewed in that light, while recognizing that the matter is not altogether free from doubt, we have concluded that the extraordinary sanction of withholding an otherwise appropriate remedial bargaining order would not best effectuate the policies of the Act.[6]

As to the propriety of a remedial bargaining order, we find that Respondent's pervasive unlawful conduct tended to undermine and destroy the Union's majority support and was of such a severe nature as to make a fair election doubtful, if not impossible.[7] In these circumstances, to deny the employees the rights normally attendant upon the designation of a bargaining agent by a majority of their number, knowing that a prompt and fair means of freely determining majority status has been effectively foreclosed by Respondent's unlawful acts, would leave this work force without any effective means of exercising its rights under our Act and would reward Respondent for

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[6] *Quintree Distributors, Inc.*, 198 NLRB No. 69; *Cascade Corporation*, 192 NLRB 533.

[7] Cf. *World Carpets of New York, Inc.*, 188 NLRB 122, enforcement denied 463 F.2d 57 (C.A. 2). In his dissent in *World Carpets*, Chairman Miller found that a fair election was possible because the effects of the employer's unfair labor practices, which consisted chiefly of a threat to move its plant, had been dissipated. However, in the instant case, the effects of Respondent's discriminatory discharges, its failure promptly to reinstate strikers, its parade of 8(a)(1) violations, and its unlawful grant of bonuses have, in his view, so indelibly imprinted in its employees' consciousness both the fear of retaliation against legitimate concerted activity and the available rewards for refraining therefrom that no free election can be held here.

its own wrongdoing. Therefore, we shall order Respondent to bargain collectively, upon request, with the Union as the exclusive representative of the employees in the unit described below, which we find to be appropriate.

Based on the foregoing and the entire record herein, we make the following:

Additional Conclusions of Law[8]

1. Respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act and thereby committed unfair labor practices in violation of Section 8(a)(1) of the Act by telling employees to report to management if and when they were asked to sign a union card; by asking employees to report their union activities and the union activities of other employees to management; by soliciting employees to abandon the union; and by threatening employees that management would lock its doors, before a strike would occur.

2. Respondent discriminated with respect to the hire and tenure of employment of its employees and violated Section 8(a)(3) and (1) of the Act by refusing to reinstate strikers Adorno and Izzo because of their alleged strike misconduct; and, further, by assigning reinstated strikers Brenda Alger and Deborah Alger to less hours of employment than they had before the strike.

3. Respondent engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act by refusing

[8] The General Counsel has excepted to the Administrative Law Judge's apparently inadvertent failure to include in his Conclusions of Law certain of the 8(a)(1) violations found by him. We find merit in this exception and hereby add the omitted conclusions.

on or about March 1, 1972, and at all times thereafter, to recognize and bargain with the Charging Party in the following appropriate unit:

> All full-time and regular part-time service and maintenance employees employed by Respondent at its Clifton Street, New Haven, Connecticut facility, including nurses' aides, kitchen employees, cooks, maintenance e nployees, housekeeping employees, and laundry employees; exclusive of all office clerical employees, professional employees, licensed practical nurses, registered nurses, physical therapist, social workers, social service director, in-service director, charge nurse, shift supervisors, activities' director, guards and all other supervisors as defined in the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Daniel A. Donovan, Charles Brennick and John Brennick, co-partners doing business under the trade name and style of Daniel A. Donovan d/b/a New Fairview Convalescent Hall Home, New Haven, Connecticut, its agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their union activities and the union activities of their coworkers.

(b) Threatening employees that it will lock its doors before allowing a strike to occur.

(c) Threatening employees with loss of their jobs, loss of their lunch and break periods, loss of their benefits and other reprisals if they choose the Union, Local 1199, Drug

and Hospital Union A/W National Union of Hospital and Nursing Home Employees, Retail, Wholesale and Department Store Union, A/W AFL—CIO, or any other labor organization, as their bargaining representative.

(d) Telling employees that it is unlawful for them to engage in any strike or any protected concerted activities.

(e) Telling employees that they should have come to management before going to the above Union and that management could get the employees a union.

(f) Telling an employee that she would not get a pay raise to which she was otherwise entitled while the employees were engaged in union activities and withholding the employee's pay raise for this reason.

(g) Telling an employee that the employees cannot have the above Union or any other labor organization as their collective-bargaining representative.

(h) Telling employees to report to management if and when they are asked to sign a union card.

(i) Promising to give employees wage increases if they refrain from engaging in union activities and engage in surveillance of coworkers union activities.

(j) Soliciting employees to negotiate directly with management and offering to adjust employee grievances and complaints in an attempt to undermine the above Union or any other labor organization.

(k) Soliciting employees to abandon the Union as their collective-bargaining representative.

(l) Granting employees Christmas bonuses or other benefits in an attempt to undermine the above Union or any other labor organization.

(m) Failing and refusing to bargain collectively, upon request, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment with Local 1199, Drug and Hospital Union A/W National Union of Hospital and Nursing Home Employees, Retail, Wholesale and Department Store Union A/W AFL—CIO, as the exclusive representative of its employees in the appropriate unit described below. The appropriate bargaining unit is:

> All full-time and regular part-time service and maintenance employees employed by Respondent at its Clifton Street, New Haven, Connecticut facility, including nurses' aides, kitchen employees, cooks, maintenance employees, housekeeping employees, and laundry employees; exclusive of all office clerical employees, professional employees, licensed practical nurses, registered nurses, physical therapist, social workers, social service director, in-service director, charge nurse, shift supervisors, activities' director, guards and all other supervisors as defined in the Act.

(n) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist Local 1199, Drug and Hospital Union A/W National Union of Hospital and Nursing Home Employees, Retail, Wholesale and Department Store Union A/W AFL—CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

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2. Take the following affirmative action, which is deemed necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with Local 1199, Drug and Hospital Union A/W National Union of Hospital and Nursing Home Employees, Retail, Wholesale and Department Store Union A/W AFL—CIO, as the exclusive representative of its employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours of work, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Make the employees named below whole for their loss of earnings in the manner set forth by the Administrative Law Judge's Decision.

1. Lucy Abbattello
2. Brenda Alger
3. Deborah Alger
4. Terry Buzzin
5. Marie Conroy
6. Myrtle Gargiulo
7. Andrew Gaura
8. Joyce Jones
9. Rachael Novicki
10. Betty O'Connor
11. Mary Ann Pace
12. Edith Richards
13. Joanne Smith
14. Adel Vaicuilis
15. Lois Fazzino
16. Gertrude LaRocque
17. Gill Sewell
18. Lillian Reynolds

(c) In the manner prescribed in the Remedy section of the Administrative Law Judge's Decision offer to employees Cynthia Bernard, Myrtle Gargiulo, Brenda Alger, Deborah Alger, Panay Adorno, and Patricia Izzo immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges and make them whole for their loss of earnings in

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the manner set forth in the Remedy section of the Administrative Law Judge's Decision.

(d) Make employee Myrtle Gargiulo whole for the loss of earnings sustained by her as a result of Respondent's unlawful withholding of her pay raise.

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its facility at New Haven, Connecticut, copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

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[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Appendix C

Dated, Washington, D.C., Oct. 30, 1973

.....

Edward B. Miller, *Chairman*

.....

John H. Fanning, *Member*

.....

John A. Penello, *Member*
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX D

(Excerpts from Decision and Recommended Order of the Administrative Law Judge in NLRB Case Nos. 1-CA-7643, 1-CA-7837 and 1-CA-7903)

[*ALJ Decision pp. 88-105*]

IV. *The Evidence Pertaining to The Conduct of the Union And the Employees During the Strike*

A. *The "CB" Cases*

Respondent—in support of its various contentions relating to alleged Union and employee misconduct before and during the strike—requests that I take notice of the charges, complaint, settlement agreement and related documents in Case Nos. 1-CB-1811 and 1-CB-1847. I have taken official notice of these proceedings as requested. The "CB" cases principally pertain to Union misconduct during the strike at the Employer's nursing home. And, on March 27, 1972, while the instant case was being tried before me, the Board approved a Stipulation for the entry of a consent decision and order against Charging Party Union in the related "CB" cases (DS 297; Case Nos. 1-CB-1811, 1847).[111] The Board's order enjoins the Union from, *inter alia,* engaging in picketing that blocks the ingress and egress of employees and other persons at the Employer's New Haven facility; damaging vehicles or other property of employees; threatening or assaulting employees or other persons because of their desire to cross the picket line or to refrain from joining the strike; following employees to and from work; and in any manner restraining or coercing employees in the exercise of their Section 7 rights. Affirmatively, the Union was directed to,

[111] The Stipulation was entered into about November 30. 1971.

inter alia, post the required notices.[112] On April 17, 1972, pursuant to the Stipulation, a Judgment was entered by the Second Circuit enforcing the Board's order as summarized above. Thereafter, by letter dated July 18, 1972, all parties were advised by the Acting Regional Director in Case Nos. 1-CB-1811 and 1-CB-1847, as follows:

> • • • Respondent having satisfactorily complied with the affirmative requirements of the Judgment in the above-entitled case, and the undersigned having determined that the Respondent is also in compliance with the negative provisions of the Judgment, the case is hereby closed.
>
> Please note that the closing is conditioned upon continued observance of said Judgment and does not preclude further proceedings should subsequent violations occur. • • •

The evidence adduced before me pertaining to the Union's and employees' alleged acts of misconduct during the strike is summarized below:

B. *The Union's Attempt to Enter The Home On May 9*

On Sunday May 9, there were approximately 125 persons gathered and congregated in or about the driveway and entranceway to the nursing home facility. There were two New Haven policemen stationed at the base of the drive-

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[112] The Employer, Charging Party in the CB cases and Respondent herein, objected to approval of the above settlement. The Board, in rejecting Respondent's contentions, noted:

> • • • the approval by the Board of this Stipulation shall not be deemed to preclude the Charging Party [Employer] from adducing in the unfair labor practice proceeding against it [the instant proceeding] evidence with respect to the matters herein settled, notwithstanding the settlement • • • to the extent such evidence is relevant • • •.

way. Union Representatives Leonard Seelig, Roosevelt Ward, Vincent Ciulla and Bill Morico were present.[113] May 9, because it was Sunday and Mother's day, was a busy visiting day at the nursing home.

Jeremiah Donovan testified that about 2:50 p.m. that day a police truck parked near the driveway and two policemen walked over to the truck. About this same time, some 40 persons stood around an automobile attempting to leave the facility. The policemen noticed and responded to the blocked vehicle. In the meantime, Union Representative Brown, Louise Tierney, Mary Jane Fazzino, Delores Dean, Marsha Twarkins, Joyce Jones, Grace Betzner and other employees assembled on Clifton Street about 50 feet from the driveway. Suddenly, Brown, Betzner, Tierney and others in their group started to run toward the front door of the nursing home, cutting across the grass, dirt and the rampway.[115] At the same time, Jeremiah Donovan, Vincent

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[113] Union Representative Brown acknowledged that there were about 100 pickets or demonstrators at the facility on May 9. Brown testified that "there was a picket line set up in the driveway, in the street at the bottom of the driveway, and we also had some people across the street in the park • • •," where speeches were being made by, *inter alia,* Union representatives.

[The ALJ, in numbering the footnotes, inadvertently omitted the number 114]

[115] Brown testified that for "the last few steps I did break into a trot, not running • • • I didn't race • • •." Brown explained:

> I saw some people coming from inside the nursing home running down the stairs [through the windows]. I saw them running down the stairs and I wanted to open the door because I wanted to go inside the nursing home. • • •

Tierney claimed: "We walked across the lawn, up the driveway and I only got as close to the Home as the [ramp] that goes across the entranceway." Tierney claimed that none of the participants ran.

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Distasio, Robert Seymour, Rick Kirshneur and Robert Murphy, all working inside the facility, ran to the front door in order to prevent Brown and the others from entering.

Jeremiah Donovan testified:

> * * * When I got down to the front door of the nursing home on the second floor, Bob Seymour was there. Bob Murphy was there, Vinny Distasio was there. Rick Kirshneur was there. At this same moment the door came flying open. Jerry Brown was there in the doorway and there was a large group of people coming behind him across this ramp.

Donovan further explained:

> * * * Mr. Brown opened the door and reached in and opened that second door. These people were all coming and we were trying to push them out just as hard as we could push them out. Hands were flaying and flying and we got the door shut. As they were coming in, there was Grace Betzner, Delores Dean [and another person] * * * They were trying to get in. We got the right hand door shut and we got them pushed out and we were trying to get the left hand door shut. A police officer reached in and pulled out Mr. Brown and then he reached in and pulled out Grace Betzner.

Betzner, assertedly, "was right in the doorway screaming * * *"; "Louise Tierney was standing there and Delores Dean was there. I [Donovan] got the door shut and got it locked." [116]

[116] Robert Seymour explained that "Jerry Brown reached in and opened the [second] door [at the entrance] by pulling on the panic bar to open both of the front doors." Seymour added:

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Robert Seymour testified:

> I tried to push these people back and get the doors closed. And Jerry Brown came through the door. He was inside the doors. And Grace Betzner came in and sat right down on the floor inside the door. * * * She was screaming * * * as were the other people outside the doors. Well, we managed to get the doors closed. And the police officer finally arrived. And he opened the door to the left and pulled both Jerry Brown and Grace Betzner out of there.

Jeremiah Donovan testified that he, Murphy, Distasio, Betzner, and Brown were arrested following the above incident.[117]

C. *The May 23 Car-Following Incident*

About May 23, William Seymour and another person working at the nursing home left the facility in a motor vehicle in order to drive non-striking employee Theresa Bosquet to her residence. Union Representatives Brown

"There was Louise Tierney. I saw her on the rampway. Mary Jane Fazzino. Other people I didn't identify * * *. Everybody was coming in * * *." Vincent Distasio observed Brown open the front door; he saw some 25 persons out there; "And then Mary Jane Fazzino and Grace Betzner fell on the floor, half way in and half way out"; "Jane Fazzino's mother [Lois] was running up screaming that they had hit her * * * and they were beating up her daughter or something like that. * * * The police came in after that."

[117] The above summary is based in part upon the testimony of Jeremiah Donovan as corroborated in part by Distasio and Seymour and substantiated in part by Brown and Tierney. Insofar as the testimony of Tierney and Brown conflicts with the testimony summarized above, I credit the testimony of Jeremiah Donovan, Distasio and Seymour as a more accurate account of the incident.

and Ward followed the Seymour vehicle in their own car. While driving Bosquet home, Seymour noticed two non-striking housekeepers walking home and he offered them a ride. Brown and Ward continued to follow the Seymour car. When the two housekeepers left the Seymour car, Ward allegedly was observed by Seymour making comments to the two housekeepers and shaking his fist at them.[118] Seymour then drove to Bosquet's residence. Brown and Ward continued to follow the Seymour car. According to Seymour, Bosquet stated that she did not want to go into her home and they then drove back to the nursing home. Seymour reported the above incident to Jeremiah Donovan and was instructed to attempt to drive Bosquet home a second time.

Seymour, accompanied this time by Rick Kirschneur and Bosquet, left the facility in their car. Brown, Ward and two other female passengers followed in the second car. Jeremiah Donovan and Carl Nickerson followed in the third car. While en route, Seymour stopped his car at a store. Kirshneur went into the store. Brown parked the second car behind the Seymour car. Ward followed Kirshneur into the store. Then, Nickerson and Jeremiah Donovan arrived in the third car and parked adjacent to the Seymour vehicle. Kirshneur left the store followed by Ward. Seymour and his people then drove off in the first car; Nickerson and Jeremiah Donovan quickly pulled behind Seymour in their car; and Brown and Ward followed in their vehicle. About this same time, a fourth vehicle driven by Stephen Brown, Union Representative Jerome Brown's brother, accompanied by a non-employee male passenger, followed Jerome Brown's car.

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[118] The two housekeepers assertedly are Sophia Tyc and Ann Czyz.

The four vehicles drove along Grand Avenue for a number of blocks. Jerome Brown unsuccessfully attempted to pass the Nickerson-Donovan vehicle. At the corner of Grand Avenue and Ferry Street, Seymour stopped his car in the left lane for a red light. Nickerson pulled his car behind Seymour's car. Jerome Brown also pulled his car behind the stopped cars. However, Stephen Brown drove his vehicle into the right lane, passed all three stopped cars, and backed up bumper-to-bumper with the first vehicle, Seymour's car. Stephen Brown got out of his car holding a "tire iron." Jerome Brown got out of his car, took the tire iron from his brother, waived [waved] the tire iron over the Seymour vehicle and assertedly threatened to break the windshield of the Seymour vehicle if that car moved. Then, Jeremiah Donovan got out of the Nickerson car carrying or holding a "piece of wood." About this time, youths wearing jackets identifying themselves as the "Crusaders" arrived at the scene.[119] An exchange of words ensued. The police arrived and no arrests were made. Seymour continued to drive Bosquet to her home and Union Representative Brown followed the Seymour car.[120]

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[119] There was testimony that so-called "Crusaders" were present at the picket line during the strike.

[120] Brown claimed, *inter alia*, that he followed the car transporting Bosquet in order to find out where she lived so that he could ask her not to cross the Union's picket line. Brown could not recall how many times this employee was followed home. Brown also claimed, *inter alia*, that he held the "tire iron" and otherwise conducted himself to protect his people until the police arrived.

The above summary of facts is based upon the testimony of Jeremiah Donovan and Seymour as substantiated in part by Brown. Insofar as Brown's version differs from the above, I credit the testimony of Donovan and Seymour as a more accurate account of this incident.

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D. *The Leaflets Distributed During the Strike; Statements Made to Visitors; The Union's Appeals to State and Local Agencies*

Brown testified that on May 9 and various other days during the strike Union representatives and members of the organizing committee distributed a handbill to "strikers, members of their family who may have been there, • • • visitors and workers who crossed the [picket] line • • •." The pamphlet, entitled "Peddlars [sic] of Health Care," states in part as follows:

• • •

> The Management of New Fairview Hall Nursing Home is completely irresponsible. Its only concern is profits out of the sick. It DOES NOT give a CARE for the patients and for the workers.
>
> This irresponsible Nursing Home has caused a lock-out of its workers and has left its patients defenseless.
>
> THEY FIRED A WORKER WHO REFUSED TO ACCEPT A $200.00 BRIBE FOR TURNING THE WORKERS AGAINST THEIR UNION.
>
> This Nursing Home is violating the National Labor Relations Law through its dirty dealings against the workers.
>
> This irresponsible Nursing Home has hired the worst anti-union lawyers in the country in order to deny their workers their basic rights.
>
> The patients are suffering while this irresponsible Management is playing games with their lives.

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> Please call upon the Governor to intervene and to restrain the unscrupulous peddlers of health care from gambling with the lives of the patients.
>
> PLEASE SUPPORT US BY ASKING THE GOVERNOR TO REMOVE THE PATIENTS FROM THE NEW FAIRVIEW HALL NURSING HOME.
>
> THE NEW FAIRVIEW HALL NURSING HOME WORKERS

Union Representative Seelig, according to Brown, authored the handbill, had it reproduced and brought copies to the facility on May 9. Jeremiah Donovan observed Seelig, Delores Dean and Linda Alger distributing the handbill.

About May 23, according to Brown, union representatives and members of the organizing committee distributed another handbill "• • • to anyone who entered the nursing home—visitors, employees and family." This handbill, entitled "From the Employees of Fairview Hall" "To All Those Concerned," stated in part as follows:

• • •

> We ask for your understanding of why we are out here on strike because we would much rather be inside doing our jobs, caring for a member of your family, and earning our living.
>
> There are 55 of us, and we joined the union of our choice, Local 1199, some months ago and filed with the National Labor Relations Board for an election. But Fairview's administrator, Daniel Donovan, tried to get us to join the union of his choice and we refused. He even tried to bribe one of us to convince the others to join his union. When the bribe was refused our fellow member was fired. We are backing her up and

fighting for our right to have the union we want, not the one the boss wants.

As a result of the strike there is inadequate staff, and conditions for the patients are difficult. We respectfully suggest that if you have someone in there, you seriously consider moving him or her to another home where normal conditions allow for proper care.

• • •

Union Representative Brown also acknowledged that on occasion "we asked the visitors for and suggested to them that they might take their patients out of there"; "we might ask the visitor to talk to the management to end the strike or perhaps to take the patient out because we felt they were not getting proper care, being short-staffed and so forth." And, Louise Tierney acknowledged that she "might have" asked visitors "to remove their family from the nursing home • • •."

In addition, Brown acknowledged that "we did talk to the State agencies • • •"; "On occasion we did ask for the removal of patients if conditions were not bettered and if the strike were not settled"; "We did contact Dr. Foote [of the State health department] • • • the patients should be removed." And, according to Tierney, Union representatives and striking employees went to the State Capitol and picketed there. Tierney acknowledged that "we were asking Governor Meskill to help us in our strike"; Tierney acknowledged that the picket signs requested the Governor to remove welfare patients from the nursing home.

In addition, on June 17, 1971, the New Haven Aldermanic Committee On Health met concerning the Employer's nursing home. Dr. Foote advised the Committee by letter, in part as follows:

• • • We have had a number of letters and telegrams concerning the nursing home alleging unsanitary conditions, inadequate staffing and various other so called violations.

We have made repeated inspections of the nursing home, investigating each complaint that has been made carefully. On each occasion we have found that sanitary conditions are good and that all of the requirements of the state regulations are being met. In fact, the staffing at all times has been better than the average found in nursing homes throughout the state and well above the requirements of the state laws. • • •

And, Edward McMahon, Assistant Director of the New Haven Health Department, reported to the Committee, in part as follows:

• • • I spoke to Mr. Seelig and some of the workers. I was told that the elevators were not in operation, there were rats and roaches and the toilets were broken. • • • I had a tour of the convalescent hospital. I found plenty of clean linen and the rooms were clean. I road [rode] the elevators. I checked the toilets and I found no defects. The kitchen was kept in a clean and sanitary manner. I found no evidence of rats, but I did find mice droppings. I suggested that they sweep them off the shelves. I also suggested that they call an exterminator. I found no evidence of cockroaches. • • •

At this meeting, employee Panay Adorno stated: "I work in the kitchen. I have seen rats. Every morning there are holes [in] bread and rat droppings." Seelig stated at the

meeting: "The patients are not receiving the proper care[118]."

E. *The Bomb-Scare and Statements To Non-Striking Workers*

1. *The bomb-scare:*

Shift Supervisor Dennison testified that during the week following May 9 she received a telephone call at the nursing home. Dennison identified the "caller's voice" as that of employee Delores Dean. According to Dennison, Dean said: "That there was a bomb in the sitting room, laughed and hung up." Dennison explained that there "were policemen around • • •" and she "told a policeman" about the call. Dean denied that she made such a call.[119] Under the circumstances and in the context of like and related conduct I am persuaded that Dean made this call to Dennison as testified by Dennison. I do not credit Dean's denial.

[In numbering the footnotes, the ALJ inadvertently repeated numbers 118, 119 and 120 twice. Consequently all footnotes following are incorrectly numbered. However, for ease of reference we have retained the numbering which the ALJ used.]

[118] Brown acknowledged that Adorno "may well have" made the above statements as reported in the minutes of the Committee meeting.

The above summary of evidence is based in part upon the documentary evidence quoted above as substantiated by the testimony of Brown, Tierney and J. Donovan. Although Seelig is now deceased, I have carefully scrutinized the above evidence and, under the circumstances, find that he made the various statements attributed to him as stated above.

[119] Dean's participation in the Union's effort is discussed *supra*, Section II L. According to Brown, Dean was also a picket captain during the strike and a member of the organizing committee. Dean's related conduct during the strike is discussed below.

2. *The visit to Cicarelli's home:*

Union Representative Brown acknowledged that about May 8 employees Mary Jane Fazzino, Louise Tierney, Grace Betzner and Brown visited the home of non-striking employee Genny Cicarelli.[120] Cicarelli testified:

> • • • Jerry Brown said to me, "Genny, you know why we are here" • • •. "We are here because we have a strike going and you are going against the workers." And I said, "Yes, I know that." And he said, "Well we don't want you to go to work." And Louise Tierney said, "You made it yesterday. Just see if you can make it today." I said, "Well, I am going to go to work." And he [Brown] said, "Well, this is going against the workers." And I told Jerry that he knew I wasn't with him anymore about a month and a half before that. And I told him I had bills to pay • • • [and] he said, "Well, the workers have bills to pay and families." Then, he told me how would I like my neighbors to know that I was a scab. And I said, "Well, my neighbors are my relatives." And he said, "Well, you have a car." • • • "How would you like your tires slashed?" And I said, "Well, you are threatening me?" And he said, "Well things get pretty rough." • • •.

Cicarelli then called her uncle. Cicarelli testified that her uncle told Brown, "I don't want you threatening my niece." Brown asked the uncle to "tell her to stay home." The uncle responded that Cicarelli "could make [her]

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[120] Cicarelli recalled that employee Marsha Twarkins was also present with Brown. Cicarelli identified the orange car in which Brown drove up as belonging to Union Representative Morico.

own mind up." Brown asked the uncle if he was a union member and then said: "Well, things get pretty nasty. You know how they get."

Cicarelli testified that Tierney asked to speak to employee Carmen Sein, also a non-striker, who was in her home. Sein came to the door. Tierney told Sein:

> • • • The workers were on strike and that she didn't want us, her, to go to work. And Carmen said she was going to work. And Louise [Tierney] said that [Sein's] husband wouldn't like what Louise would have to say to him • • •. And then Louise said, again, "You made it yesterday. Let's see if you can make it today?"

Brown testified that "We tried to convince them that they shouldn't cross the picket line." Brown testified:

> • • • I indicated to her that she had neighbors who were union members that they might not think it was proper for her to cross the picket line, that we might very well ask some of them to discuss it with her • • •.

Brown admitted asking Cicarelli's uncle if he was a union member. Brown assertedly "tried to urge him to ask his niece not to cross the picket line." Brown did not "remember" whether Tierney stated to Cicarelli and Sein, "You crossed the picket line yesterday but you are not going to make it today." Brown and Tierney denied the various statements attributed to them.[121]

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[121] I credit the testimony of Cicarelli summarized above as substantiated in part by Brown and Tierney. Insofar as Cicarelli's testimony differs from the testimony of Brown and Tierney, I am persuaded that Cicarelli's account is more accurate and reliable.

3. *The visit to Armstrong's home:*

Darlene Armstrong [Bachman] was a non-striking worker at the facility. Armstrong testified that about May 27 she and two non-strikers left the facility in a car driven by Philip Murphy; that she exited from the car at her home; and that shortly thereafter Murphy returned to her home. Murphy told Armstrong he had observed "a carload of people from the picket line around the corner from [her] house • • •." Armstrong then called the police. Employees Tierney, Adorno and Dean approached the front steps. Armstrong and Murphy went to the front porch. Armstrong testified:

> • • • [Murphy] told them to leave me alone because the police were on their way. Then Jerry Brown and Delores Dean's younger brother • • • came up behind the girls. • • • Delores [Dean] and Jerry [Brown] and [Louise] Tierney said • • • they wanted to talk with me. I told them I had nothing to discuss with them. • • • When Phil [Murphy] told Jerry [Brown] that nothing better happen to me, Jerry Brown told Phil • • • to worry about himself. Jerry Brown told me that if I continued to work there, if I kept crossing the line, my legs might be broken. • • • Delores Dean said I was lucky they hadn't been waiting in the hall for me. • • • [Tierney said,] If I wasn't willing to talk with them out on the street, that they would get me when they got back to the hospital. When they got back in they were going to make life hell for anybody who continued to cross the picket line.

Armstrong added that, after Brown told Phil Murphy "to worry about what was going to happen to himself, Phil

went to his car and got a stick out of his car." About this time, a relative of Armstrong assertedly came out on the porch with a 13-foot boa constrictor wrapped over her shoulders. Brown and his group left. Armstrong accompanied by a detective, went to the facility, and pointed out, *inter alia,* Brown, Tierney, Dean and Adorno, whereupon they were all arrested.

Brown recalled visiting Armstrong about May 27. Brown claimed that he "drove the employees" and stayed "in [his] car." Brown recalled that Tierney, Adorno, Dean and Murphy were present. Brown testified:

> I really don't recall the whole sequence of events. I went over to the group and I think Phil • • • Murphy came back and got out of the car and went over to Miss Armstrong—I then went over to the group • • • I asked the employees to come with me, that there was no purpose in staying there any further • • •.

Brown's asserted purpose for the visit was "to speak to Miss Armstrong." Brown also testified:

> These women were talking to Miss Armstrong while I was across the street, and as I approached when I saw Murphy get out of his car • • • they told me that Murphy had a black jack • • •.

Brown acknowledged that his group was arrested at the picket line.

Tierney testified that Brown, Adorno, Dean and herself visited the Armstrong residence to "ask her if she would honor our picket line and not go back to work there." Tierney claimed that Brown at first was "across the street" and crossed over after Murphy "had a black jack and he

threatened to hit us with it." Tierney claimed: "We just asked [Armstrong] if she would honor our picket line."

Dean testified that about May 27 she was part of the group that went to Armstrong's home; that Armstrong went into her home; that Murphy "spotted us and turned around and went back"; that Armstrong and Murphy "told us if we didn't get out of there she was going to have us arrested"; that Murphy "got the jack out of his car • • • and he was waiving [waving] it"; that a relative of Armstrong came down "with a snake and told us she was going to sick the snake on us"; and that "we left." Dean denied telling Armstrong that she was "lucky • • • we could have waited for her in the hall • • • " or that "anyone said that she would get her legs broken." [122]

4. *The visit to Lee's home:*

According to non-striking employee Mamie Lee, Union Representative Brown visited her home about May 19. Lee testified:

> • • • Jerry Brown rang my door bell. And he said he wanted to talk to me concerning the union. I told him I didn't want to talk because I had to come to work. And he said • • •, "We don't want you to go to work,

[122] Dean testified: "I don't remember exactly what anybody said. All I know is we asked her how come she was crossing the picket line • • • ." Tierney could not "remember" Dean telling Armstrong that "You are lucky we didn't catch you in the hallway."

I credit the testimony of Armstrong as stated above. Her testimony is substantiated in part by the testimony of Brown, Tierney and Dean. Insofar as the testimony of the latter witnesses conflicts with the testimony of Armstrong, I credit Armstrong. Further, I do not regard Armstrong as incredible because, as urged by counsel for General Counsel, she was convicted of "aggravated assault" during April 1971.

> you will be taking bread out of the worker's mouth." I say, "If I don't go I'll be taking bread out of my own mouth." So then, he said, "we have been to the welfare. They are going to give us food stamps. And we'll give you $15 per day." I told him it wasn't enough money for me because I had bills to pay, and I had to work. And then he said, "Well, if you do go, we won't be responsible for what happens to your car or your home. * * * [123]

Brown testified that he spoke to Lee at her home; that he "urged her * * * to stay out * * *"; and that he discussed "the purposes of the strike" and the various economic benefits or assistance. Brown denied saying "anything in the course of the conversation to the effect that [he] or the Union wouldn't be responsible for what happened to her." [124]

5. *The visit to Rich's home:*

According to Rose Rich—a non-striking employee—Union Representative Vincent Ciulla, employees Adorno and John Donahue visited her home and asked her not to go to work. Rich thereafter stayed away from work for about one week. Rich then returned to work. Shortly thereafter, according to Rich, she discovered that her automobile was

[123] Thereafter, Lee discovered three flat tires on her 1962 Oldsmobile. On another occasion, there were two flat tires on her 1966 Chevrolet. And, on another occasion, she found that three of her house windows had been broken.

[124] I credit Lee's testimony as stated above. Her testimony in part is substantiated by Brown. Insofar as Brown's testimony conflicts with Lee's testimony, I find that Lee's account is more accurate.

splashed with paint while parked overnight in her driveway. She called the nursing home and was given a ride through the picket line that day. Rich recalled that, as she crossed the line, Tierney yelled: "* * * How's your car, Rose?" Thereafter, according to Rich, she received a telephone call from a person who she identified as Union Representative Ciulla. He stated: "I see you had your car fixed. How would you like to have something new done, something else done to it." Rich hung up the telephone.[125]

Tierney testified that Adorno, Ciulla and herself went to Rich's home in order to persuade her not to cross the picket line. Ciulla said: "That she should stay out with the workers. It was only right." According to Tierney, Rich stayed away from work for one week and then returned to work. Tierney testified that "whenever [Rich] was driven through the picket line," Tierney "might have called her a scab." [126]

F. *The Conduct at the Picket Line*

1. *May 6:*

About 10 p.m. on May 6, Union Representatives Brown, Seelig, Ward and Morico, together with some 30 to 40 employees, gathered about the driveway to the nursing home. Mr. Romer, husband of a nurse working at the

[125] Rich, on cross-examination, agreed that her telephone caller "possibly" "could have been someone other than Ciulla."

[126] Although Rich was at times a confused and nervous witness (See Section III, C, (17), *supra*), I credit her testimony as stated above. Tierney in part corroborated Rich. I am persuaded that Rich truthfully related the above incidents. Insofar as Tierney's testimony conflicts with the above, I credit Rich's testimony as stated. Further, I find that, under the circumstances, Rich sufficiently identified her telephone caller as Ciulla. Ciulla did not testify.

facility, drove to the entrance. As a result of the large crowd, Romer stopped his car and then started forward slowly. Union representatives banged on his car with their flashlights. Strikers, including Dean and Linda Alger, were observed hitting the Romer car with their fists. Romer drove into the parking lot, picked up his wife and attempted to leave. He was required to stop; his car was was banged upon by flashlights and fists; he finally exited. Brown, during the above, was observed calling Romer an "S.O.B." About this time, Mr. Sidlauscus, husband of an aide working at the facility, encountered similar difficulties in entering the driveway. He backed out, parked on the street, and—with the assistance of a police officer—walked his wife to the car.

Later that evening, Jeremiah Donovan arrived at the premises in a car driven by Robert Murphy. The car was stopped by the crowd; vulgar hand gestures and statements were made by the strikers; a policeman cleared a path; and the car entered the lot. The picketing ended about 1:30 a.m. In departing, strikers—including Union Representative Ward—drove up and down Clifton Street blowing their car horns.[127]

2. *May 7:*

By 7 a.m. on May 7, there were 20 to 30 pickets present at the premises. Brown and Ward were there. Seymour was transporting non-strikers to work. Seymour, upon observing the crowd, determined not to use the driveway and drove his car with non-strikers Cicarelli and Sein

[127] The above summary is based upon the mutually corroborative testimony of Jeremiah Donovan and Robert Seymour, which testimony I credit. Insofar as Brown denied the various acts of conduct attributed to him, I credit the testimony stated above.

across the dirt or grass and into the parking lot.[128] Employees Dean, Linda Alger and Mary Jane Faz[z]ino were observed yelling at Sein and Cicarelli, "you will be sorry"; "they were going to get them."

Daniel Donovan arrived later with several nurses. Ten to 20 persons—including Ciulla and Morico—stood in the driveway around the Donovan car. Morico kicked the car. Donovan had Morico arrested. Morico then called Donovan a "bastard." Ciulla warned: "it is going to get a lot worse before it gets better. We are going to have 300 kids up here from Yale." [129]

3. *May 9:*

The events occurring on May 9, Mother'd[s] Day, have been described above. Present at the facility that day were Union Representatives Seelig, Brown, Ward, Ciulla and Morico. There were at times 100 to 125 people present. The picket line extended 20 to 25 feet into the Home's driveway. Supervisor Dennison, as she attempted to enter that day, observed Union Representative Ward and others hitting her car with their fists. Someone told her that she was not going to enter. She did. Stephen Brown, brother of Jerry Brown, and Ward were arrested at the picket line that day. As Cicarelli entered the facility that day, Mary Jane Faz[z]ino made a vulgar remark to her.[130]

[128] Kirshneur was also in the car.

[129] The above summary is based upon the mutually corroborative testimony of Daniel Donovan, Jeremiah Donovan, Seymour and Cicarelli, as substantiated in part by Brown. Insofar as Brown's version differs from the above, I credit the above.

[130] The above summary is based in part on the mutually corroborative testimony of J. Donovan and Dennison as substantiated in part by Brown. Insofar as Brown's version differs from the above, I credit Donovan and Dennison.

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4. *May 10:*

While Dennison was leaving the Home's driveway on May 10, Dean was standing next to Tierney's car; Tierney was seated in the car on the driver's side. Dean picked up some pebbles or small rocks and threw them at the Dennison's car, hitting the windshield. And, that same evening some 20 to 30 persons gathered about the driveway entrance chanting, *inter alia,* "Jeremiah is a Bullfrog" and "Donovan come on out here. We will roll right over you." [131]

5. *May 11:*

On May 11, Union Representative Brown told Kirshneur, who was then dumping refuse, "* * * he [Brown] could very easily arrange to have his [Kirshneur's] legs broken." That same day, Linda Alger (Stratford) and Mary Jane Fazzino drove to the Cicarelli home. Fazzino got out of the car with a rock in her hand. Cicarelli was then seated in her car in her driveway. Cicarelli asked Fazzino "what the hell are you doing here?" Fazzino replied: "* * * you are going to get it." Fazzino threw the rock through the rear window of Cicarelli's car. A fight ensued. Alger got out of the car and joined the fight. Fazzino and Alger then got back into their car. Cicarelli picked up a bottle and broke the windshield of the Alger car. All three were arrested. Later that day, as Cicarelli was crossing the picket line, Fazzino and Dean yelled: "Genny, that wasn't enough. You will get more."

That same afternoon, Linda Alger blocked a car attempting to enter the nursing home by laying down in the drive-

[131] The above summary is based in part on the credible testimony of Dennison and J. Donovan. I do not credit Dean's denial of the conduct attributed to her.

Appendix D

way. A policeman ordered her to leave. And, during the evening, over 40 pickets walked about the driveway.[132]

6. *May 12 and late June:*

There was, according to the credible testimony of Jeremiah Donovan, a large number of pickets present about the driveway entrance on May 12. And, according to the credible testimony of Seymour, strikers Mary Jane Fazzino and Twarkins shot water pistols into a car transporting non-strikers through the picket line.

During late June, non-striker Armstrong attempted to enter the nursing home in her sister's car. Mary Ann Pace and Pat Izzo crossed the driveway and put their hands on the passenger door of the Armstrong car. Izzo leaned her head into the car window, saying: "* * * you know what we do to scabs." Pace said the same thing. Armstrong made a "spitting noise" at Izzo. Armstrong and Izzo were both arrested.

Previously, Armstrong had been a patient at the mental institution where Union Representative Morico was employed as an orderly. When Armstrong attempted to cross the picket line at Respondent's facility, Morico, Izzo and Dean openly commented upon Armstrong's prior men-

[132] During the early morning hours of May 11 or 12, an unidentified person threw a rock through the front porch window of the Cicarelli home.

The above summary is based upon the mutually corroborative testimony of Seymour and Cicarelli, which testimony I credit. Alger in part substantiates Cicarelli's testimony. Insofar as Alger's and Dean's testimony conflicts with the testimony of Cicarelli and Seymour, I credit the lat[t]er. I do not credit Linda Alger's testimony that Cicarelli "started yelling and throwing rocks at us * * *" after they visited her. Likewise, I do not credit Alger's denials of the various conduct attributed to her as stated above.

tal condition. Morico told Armstrong that he would tell everyone about her hospitalization. Brown made like and related statements to Armstrong.[133]

7. *August 8 and August 10 or 11:*

On Sunday August 8, up to 95 to 100 persons, including Union officials, congregated and picketed in front of the nursing home. The largest concentration occurred around the 3 p.m. shift change. Clifton Street was lined with parked cars. The picket line extended into the home's driveway some 40 or 50 feet. Cars entering or leaving were surrounded, and were rocked and banged upon. Obscenities were uttered. Stones were thrown. Some non-striking employees attempted to leave the premises by the kitchen exit. Among others, Union Representative Ward, Dean, Betzner, Deborah and Brenda Alger went on the Employer's grounds; they yelled, cursed and screamed in an attempt to prevent the non-strikers from leaving.[134]

[133] The above summary with respect to Armstrong is based upon her testimony as substantiated in part by Izzo and Pace. Insofar as Izzo and Pace deny or differ in their versions of the above incidents, I credit Armstrong. I note that Morico was not called as a witness. Instead, Brown testified that Morico was employed by the Union as an organizer in January 1971 but was "la[id] off" on April 1, 1971. Brown testified that Morico was called back by the Union October 1971. I do not credit Brown's uncorroborated testimony that Morico was not employed by the Union between April and October 1971. Morico, admittedly, was present during that period at the picket line; he assisted Brown during that period; he carried a picket sign during that period; and Morico permitted Brown to use his car during that period. Under the circumstances, I find that Morico was a Union organizer and employee at all times material herein.

[134] Cicarelli testified that Brenda Alger yelled: "Genny, don't come down. I'll break your legs." As Cicarelli left, she and other non-strikers were called "scabs" and "dirty words." Delores Dean on occasion called her a vulgar name. Cicarelli admittedly swore back at Brenda Alger and others at the picket line.

The evidence summarized above is based upon the mutually corroborated testimony of Shepard, Seymour, Cicarelli, Janelle Cousins, Brendalee Payne, Jean Melillo, as substantiated in part by Brown and Tierney. Brown and Tierney denied the various alleged acts of misconduct attributed to them. Brown claimed that there was no banging on cars. I credit the testimony summarized above as more accurate.

G. *Seelig and Brown Follow Daniel Donovan and Nickerson*

On a number of occasions during the strike, as stated above, Union representatives followed management representatives and non-strikers from the facility to their homes. In late May 1971, Daniel Donovan left the facility in a car driven by Carl Nickerson. Seelig and Brown followed after Donovan. Donovan testified:

> We made all the maneuvers on the side streets there onto Grand Avenue. As we proceeded up Grand Avenue, Mr. Seelig on two or three occasions came up on the righthand side of our car but was never able to sustain that position because there were cars parked. So we had a series of him pulling over and coming up on the righthand side and having to keep going back and forth.
>
> • • • •
>
> We proceeded down Grand Avenue. We had to stop at the lights just after the railroad crossing, at which time Mr. Seelig was able to pull up and stop directly beside us. I was sitting on the passenger side in the front seat. He rolled down the window and said to me, "I want to talk to you." My window was closed and I just waved my head to indicate "no" and the

light changed. At that time Mr. Seelig started off at an accelerated rate and started to turn his car towards the left. Both Carl and Mr. Seelig started to accelerate at a rather high rate of speed. Mr. Brown was directly behind our car. We had a situation where Mr. Seelig was turning his car to the left and Carl was turning to the right. • • • The speed got to what I would consider high for the particular area, 40 or 50 miles an hour, with Mr. Brown directly behind us and Mr. Seelig on one side. We drove all the way down Grand Avenue at a high rate of speed and we turned right on Grand Avenue, a lot of tires screeching and so forth and with Mr. Seelig right beside us as the case may be.

• • • •

Nickerson finally pulled his car to the side of the road in front of State police officers. I credit Donovan's testimony as stated above.[135]

On August 10 or 11, Tierney—in the presence of Brown—told Seymour that there would be another mass demonstration the following weekend and if he, Seymour, got in their way he might get his arms or legs broken.

• • • • •

[135] I note that Seelig is deceased and, accordingly, I have carefully scrutinized the above testimony. Nevertheless, as stated, I credit the above. In addition, there was at least one incident when Union Representative Morico swerved his car into the path of Respondent's vehicle according to the undenied and credible testimony of Seymour and Distasio. And, I note that Brown could not recall whether he told a reporter, with reference to an article appearing in the Register on August 9, that the Union "will be as militant as it has to [to] win the strike."

[*ALJ Decision—pp. 140-141*]

B. *The Nature of the Strike; Tierney's Suspension and Discharge; Respondent's Unlawful Conduct in Reinstating the Strikers*

As found *supra,* Section II P, the employees met following the suspension of employee Tierney and "voted at this meeting unanimously to demand the reinstatement of Mrs. Tierney and to give management • • • a 24-hour deadline to reinstate Mrs. Tierney • • •; if Mrs. Tierney was not reinstated, the workers voted to strike • • •." An ultimatum to this effect was communicated to the Employer; the Employer rejected the ultimatum; and the strike commenced.

Under settled principles, where an employer's unfair labor practice conduct constitutes "one of the causes of [a] strike, • • • the strike [is] an unfair labor practice strike and the strikers [are] protected against replacement during the period of the strike • • •." *N.L.R.B.* v. *Milco, Inc.,* 388 F. 2d 133, 139 (C.A. 2, 1968) (and cases cited). However[,] in the instant case, I find and conclude, as discussed in Section II O, *supra,* that Tierney's suspension and discharge were not in violation of Section 8(a)(1) and (3) of the Act. In short, Tierney was suspended and discharged because she distributed leaflets and told employees about an untrue attempt by management to bribe her and not because of protected activities. Accordingly—although employees mentioned at the strike vote meeting Respondent's coercive conduct—I find and conclude that under the circumstances the only cause of the ensuing strike was, as stated in the Union's 24-hour deadline ultimatum, Tierney's suspension and discharge. Therefore, I find and conclude the strike was not caused by Respondent's

unfair labor practices and, further, Respondent did not thereafter engage in unlawful actions which would convert this strike into an unfair labor practice strike. Cf. *N.L.R.B.* v. *Plastilite Corp. Inc.*, 375 F. 2d 343, 348 (C.A. 8, 1967); *N.L.R.B.* v. *Waukesha Lime & Stone Co.*, 343 F. 2d 504, 510 (C.A. 7, 1965).

• • • • •

[*ALJ Decision—pp. 144-148*]

D. *The Propriety of a Bargaining Order*

As discussed *supra*, Section III A, I find and conclude that a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 of the Act is:

• • • • •

> All full-time and regular part-time service and maintenance employees employed by Respondent at its Clifton Street, New Haven, Connecticut facility, including nurses' aides, kitchen employees, cooks, maintenance employees, housekeeping employees, and laundry employees; exclusive of all office clerical employees, professional employees, licensed practical nurses, registered nurses, physical therapist, social workers, social service director, in-service director, charge nurse, shift supervisors, activities' director, guards and all other supervisors as defined in the Act.

• • • • •

Further, as discussed in Section III B and C, *supra*, I find and conclude that a majority of employees in the aforesaid unit voluntarily and knowingly signed valid authorizations designating the Union as their bargaining agent prior to March 1, 2 and April 7, at which times

the Union repeatedly had demanded recognition from the Employer in the aforesaid unit. As discussed above, I find and conclude that Respondent declined the Union's demands for recognition and, instead, engaged in pervasive and extensive acts of coercion, restraint and interference with employee Section 7 rights.

The legal principles ordinarily relevant in cases of this nature are those stated by the Supreme Court in *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). In *Gissel*, the Supreme Court sustained the Board's remedial authority to issue a bargaining order in cases where unfair labor practices have been committed "that interfere with the election process and tend to preclude the holding of a fair election." *Id.* at 594. The Court indicated that a bargaining order would be appropriate (1) where the employer's unfair labor practices are so "pervasive" and "coercive" that it is the only effective means of remedying those unfair labor practices, or (2) where the unfair labor practices, though less substantial, are nonetheless such that "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment, once expressed through cards, would, on balance, be better protected by a bargaining order." *Id.* at 614.

However, in the instant case, Respondent asserts, *inter alia*, that a bargaining order should not enter because of the Union's misconduct. Recently, in *Allou Distributors, Inc.*, 201 NLRB No. 4 (1973), the Board dealt with a similar contention. The Board noted that previously, in *Laura Modes Company*, 144 NLRB 1592 (1963),

• • • • •

• • • the employer, after the union requested recognition based on an authorization card majority, held two separate meetings with the employees in which it requested the employees to withdraw from the Union, told them it did not intend to contact the union the next day as promised, or any day thereafter, threatened them with layoffs, and reduction of work, and announced it would never sign a contract with the union. Apprised of this conduct, the union sent nine business agents to the plant "to bolster [the employees'] morale." Upon being refused entry to the premises, one of the agents struck an employer representative, and pushed around an office employee who was attempting to telephone the police. On another occasion, while a strike was in progress, the same employer representative was assaulted. Although 8(b)(1)(A) charges were filed, a settlement agreement was entered into, and the CB complaint was withdrawn.

The Board found that the employer's conduct evidenced an intent to undermine the union's majority status and to evade the employer's bargaining obligation, thereby violating Section 8(a)(1) and (5).

• • • • •

However, in *Laura Modes, supra,* the Board declined to enter a bargaining order, stating:

• • • • •

> But our finding that the Respondents acted unlawfully prior to the Union's misconduct is not to be taken as condonation of the Union's subsequent resort to or sanction of violent acts in furtherance of its demand that the Respondents immediately recognize and bargain with it. An atmosphere of violence and intimidation can hardly be expected to produce Respondent's

participation in reasoned discussion with union agents about the subjects of collective bargaining.

• • • • •

For we cannot, in good conscience, disregard the fact that, immediately before and immediately after it filed the instant charges, the Union evidenced a total disinterest in enforcing its representation rights through the peaceful legal process provided by the Act in that it resorted to and/or encouraged the use of violent tactics to compel their grant. Our powers to effectuate the statutory policy need not, we think, be exercised so singlemindedly in aiming for remedial restoration of the *status quo ante,* that we must disregard or sanction thereby union enforcement of an employer's mandatory bargaining duty by unprovoked and irresponsible physical assaults of the nature involved here. We recognize of course that the employees' right to choose the Union as their representative survives the Union's misconduct. But we believe it will not prejudice the employees unduly to ask that they demonstrate their desires anew in an atmosphere free of any possible trace of coercion.

• • • • •

In *Allou,* the Board applied the *Laura Modes* rationale, stating:

• • • • •

> In the same vein, the Union here engaged in a deliberate plan of intimidation and violence in order to insure the employees' adherence to the Union. This callous attempt to enforce its representation rights—notwithstanding the Company's own unlawful and deplorable conduct—is, in our opinion, of such a nature as to preclude a bargaining order remedy. We there-

fore believe that in light of the coercive conduct which has heretofore occurred by both parties, the policies of the Act will best be effectuated by directing a remedial election so that the employees, themselves, can determine the representation status of the Union.[186]

• • • • •

And see, *World Carpets,* 188 NLRB No. 10 (1971), enforcement denied, —— F. 2d ——, 80 LRRM 2712 (C.A. 2, 1972).

In this case, I find and conclude that the Charging Party Union (as discussed *supra,* Section IV) engaged in serious acts of misconduct during the strike. Thus, I find and conclude that Union Representative Brown accompanied by striking employees forcibly entered the Employer's nursing home during the strike; Union Representative Brown accompanied by striking employees and others followed non-striking employees to and from work and repeatedly threatened them with physical harm and property damage; striker Dean, also a picket captain for the Union, called in a bomb-scare to the nursing home during the strike; Union Representative Ciulla threatened non-striking employee Rich with property damage; Union representatives participated in mass picketing, blocking the ingress and egress of non-strikers and banging on cars;

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[186] The Board also stated:

• • • • •

In accord with the foregoing, we shall direct the Regional Director to direct and supervise the conduct of an election (1) when compliance with our Order herein is voluntarily achieved, after the posting period has elapsed and at such time as the Regional Director determines that a free election can be held; or (2) should the Respondents fail to comply with the provisions in this Decision and Order and it is necessary to have this Order enforced by a decree of a United States court of appeals, upon the Respondent's full compliance with such decree.

Union Representative Morico kicked a car and cursed at and threatened management and, thereafter, attempted to run one of the Company's representatives off the road during the strike; striker Dean threw small rocks or pebbles at a supervisor's car attempting to leave the facility during the strike; strikers Mary J. Fazzino and Linda Alger assaulted a non-striker and damaged her property; and Union representatives threatened, followed and harassed management's representatives as they attempted to enter and leave the facility. And, as found *supra,* Section II G, M and P, even before the strike Union representatives repeatedly attempted to enter the Employer's facility without permission.[187]

In sum, I find and conclude that, as the Board stated in *Laura Modes Company, supra,* 144 NLRB at 1596: "in the particular circumstances of this case the policies of the Act and the legitimate interests of the public and the parties will best be served by denying the Union the right to invoke our statutory processes in aid of a demand for recognition as bargaining representative of Respondent's employees unless and until it demonstrates its majority among those employees through the Board's election procedures."

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[187] I find and conclude that the Union is responsible for the misconduct of Dean, M. J. Fazzino, L. Alger and other strikers as found herein. By engaging in and condoning violence, threats, intimidation and other coercive conduct, the Union established a pattern and practice which Dean and other strikers followed. In such circumstances, the Board attributes the unlawful actions of an individual to the Union on whose behalf the individual engaged in misconduct. See, generally, *Compton* v. *Puerto Rico Newspaper Guild, Local 225,* 80 LRRM 2158, 2161-2162 (D.C.P.R., 1972) and cases cited.

It is unnecessary for me to determine whether a bargaining order should be withheld because, as the Employer argues, "The Union maliciously defamed the Employer's services and attempted to close the facility" (Br., p. 28).

APPENDIX E

(Selected Excerpts From Text of National Labor Relations Act, as Amended)

SHORT TITLE AND DECLARATION OF POLICY

Section 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

• • • • •

RIGHTS OF EMPLOYEES

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations,

to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

• • • • •

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

• • •

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

• • •

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

• • •

(g) A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health

care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

• • • • •

Supreme Court, U. S.
FILED
DEC 16 1975
MICHAEL RODAK, JR., CLERK

No. 75-635

In the Supreme Court of the United States

OCTOBER TERM, 1975

DANIEL A. DONOVAN, CHARLES BRENNICK AND JOHN BRENNICK, CO-PARTNERS doing business under the trade name and style of DANIEL A. DONOVAN d/b/a NEW FAIRVIEW HALL CONVALESCENT HOME, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

SANDRA SHANDS ELLIGERS,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 520 F. 2d 1316. The decision and order of the Board (Pet. App. 18a-30a) are reported at 206 NLRB 688.[1]

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[1] The petition reprints only excerpts from the Administrative Law Judge's decision. The full decision is reprinted in

JURISDICTION

The judgment of the court of appeals (Pet. App. 16a-17a) was entered on August 7, 1975. The petition for a writ of certiorari was filed on October 29, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the National Labor Relations Board properly ordered the employer to recognize and bargain with the union as a remedy for its violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act.

STATUTE INVOLVED

Most of the relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) ,are set forth at Pet. App. 64a-66a.

Section 8(a)(3) of the Act provides:

> It shall be an unfair labor practice for an employer—
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *.

---

the Joint Appendix (J.A. 66A-224A) in the court below. A copy has been lodged with the clerk.

STATEMENT

Daniel Donovan, Charles Brennick, and John Brennick are co-partners doing business under the trade name "Daniel A. Donovan d/b/a New Fairview Hall Convalescent Home." The Company is a licensed proprietary nursing home and extended care facility located in New Haven, Connecticut (J.A. 71A-72A).

The Union [2] held its first organizational meeting in February 1971. After obtaining authorization cards from 39 of the 58 Company's service and maintenance employees, the Union requested the Company to recognize it as the employees' bargaining representative. On March 2, 1971, after the Company had failed to respond, the Union mailed authorization cards from 30 employees to the Board and petitioned it for an election (J.A. 73A-74A, 78A-80A). On March 11 the Company rejected the Union's second request for recognition (J.A. 93A).

Meanwhile, beginning in mid-February 1971, the Company made a concerted effort to undermine the Union's organizational activities. On numerous occasions the Company threatened employees with loss of their jobs if they continued to support the Union, and with loss of benefits, including lunch periods and breaks, if the Union were allowed into the facility; solicited employees to negotiate grievances directly with the Company rather than through the Union;

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[2] Local 1199, Drug and Hospital Union a/w National Union of Hospital and Nursing Home Employees, Retail, Wholesale and Department Store Union a/w AFL-CIO.

and coercively interrogated employees. In addition, the Company promised a pay increase to an employee for refusing to support the Union and withheld an increase from a Union supporter (J.A. 193A-209A; Pet. App. 19a).

On May 6, 1971, the Union struck in support of an employee, a Union activist, whom the Company had discharged. At least 51 unit employees participated in the strike (J.A. 127A-128A).[3] After the strike ended in September the Company renewed its coercive activity against those who had supported the Union. The Company refused immediately to reinstate 18 strikers to available jobs and thereafter delayed their reinstatement when job vacancies arose. The Company declined to reinstate several strikers to substantially equivalent jobs, assigning one former striker to a more onerous position and denying two others full reinstatement. Three months after the strike, for the first time and without explanation, the Company awarded Christmas bonuses to the unit employees (J.A. 175A-192A, 128A-129A; Pet. App. 19a-21a).

During the four-month strike a few striking employees made threats and engaged in name-calling from the picket line against non-striking employess. Striking employees also followed cars twice, hit nonstrikers' cars with fists and pebbles two or three times as they passed the picket line, unsuccessfully

[3] The strike was ultimately determined to be an economic strike (J.A. 209A).

attempted to block entrance to the Company's premises, broke the windshield of one nonstriker's automobile, and once unsuccessfully attempted forcible entry onto company premises. There were no physical assaults upon employees or supervisory personnel. The nonstriking employees continued to report for, and were able to, work during the strike (Pet. App. 22a).

Upon charges filed by the Union, the Board found that the Company's efforts to undermine the Union violated Section 8(a)(1) of the Act (J.A. 217A-218A; Pet. App. 19a). The Board also found that the Company's refusal immediately to reinstate 18 strikers, the subsequent delay in reinstating them as jobs became available, the refusal to offer full reinstatement to three of the strikers, and the refusal to reinstate two strikers who had engaged in minimal misconduct during the strike violated Section 8(a)(3) of the Act (J.A. 218A; Pet. App. 19a-21a).

The Board found that the Union had obtained valid authorization cards from a majority of the Company's employees by the time it made its initial request for recognition, that the Union retained this majority when it made its subsequent request for recognition, and that the Company's refusal to recognize and bargain with the Union violated Section 8(a)(5) and (1) of the Act (Pet. App. 21a). The Board concluded that the Company's "pervasive unlawful conduct tended to undermine and destroy the Union's majority support and was of such a severe nature as to make a fair election doubtful, if not

impossible" (Pet. App. 23a). The Board finally concluded that the acts of misconduct engaged in by some strikers were not so substantial as to warrant the withholding of an otherwise appropriate bargaining order (Pet. App. 22a-23a). The Board therefore ordered the Company to bargain with the Union upon request (Pet. App. 24a).

The court of appeals sustained the Board's findings and enforced its order (Pet. App. 1a-15a).

ARGUMENT

Under the principles of *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, the Board is entitled to direct an employer to bargain with a union where, as in the instant case, the union has a card majority [4] and the employer engages in serious unfair labor practices that makes it improbable that a fair election could be held. Petitioner's assertions to the contrary notwithstanding, in this case the Board fully scrutinized the nature, extent, and effect of the Company's unfair labor practices on employee rights before determining that a bargaining order was appropriate.

[4] Petitioner does not challenge the validity of the authorization cards at the time they were offered to the Company as proof of Union majority. Its contention (Pet. 9-10) that the Union's alleged misconduct renders the cards unreliable as indicators of Union support is belied by the fact that 51 of the 58 unit employees supported the Union strike in the face of massive employer unfair labor practices, and that no employee revoked, or attempted to revoke, his authorization.

For example, the Board found that petitioner's "pervasive unlawful conduct tended to undermine and destroy the Union's majority support and was of such a severe nature as to make a fair election doubtful, if not impossible" (Pet. App. 23a). And, as the Board added, "the effects of the [Company's] discriminatory discharges, its failure promptly to reinstate strikers, its parade of 8(a)(1) violations, and its unlawful grant of bonuses have * * * so indelibly imprinted in its employees' consciousness both the fear of retaliation against legitimate concerted activity and the available rewards for refraining therefrom that no free election can be held here" (Pet. App. 23a, n. 7).

Accordingly, the basic question presented by the petition (Pet. 10-13) is whether the Board departed without just cause from the course it followed in *Laura Modes Co.*, 144 NLRB 1592 (1963), and *Allou Distributors, Inc.*, 201 NLRB 47 (1973), which held that misconduct by the union may warrant withholding a bargaining order that would otherwise be appropriate.[5] The Board found (Pet. App. 22a), and the court below agreed (Pet. App. 8a-14a), that the situation here is factually distinguishable. Unlike the situations in *Laura Modes*

[5] The Board did not "balance" (see Pet. 8-9) the employer's misconduct against that of the Union in determining whether a bargaining order would be appropriate. Only after conducting a proper *Gissel* inquiry did the Board consider whether an otherwise proper bargaining order should be withheld in order to penalize or deter Union misconduct.

and *Allou*, the strike misconduct in the instant case involved only a handful of Union members and occurred only sporadically during the lengthy strike; there were no physical assaults on employees or supervisors by Union agents; the Union did not seek to use its own misconduct as a means of extracting recognition outside the Board's election processes. In these circumstances, the Board did not abuse its broad remedial authority in concluding that the Union misconduct did not foreclose a bargaining order.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

JOHN S. IRVING,
General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

SANDRA SHANDS ELLIGERS,
Attorney,
National Labor Relations Board.

DECEMBER 1975.

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[6] As the court below noted (Pet. App. 12a-13a), the excesses by the Union subject it to "appropriate remedies" under the Act. See Pet. App. 31a-32a.

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-635

DANIEL A. DONOVAN, CHARLES BRENNICK and JOHN BRENNICK, Co-Partners doing business under the trade name and style of DANIEL A. DONOVAN d/b/a NEW FAIRVIEW HALL CONVALESCENT HOME,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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The Petitioner herein submits this reply to the Brief, filed by the Solicitor General, Department of Justice and General Counsel of the National Labor Relations Board, in opposition to the Petition for Writ of Certiorari.

In its Brief to this Court, the Solicitor General and General Counsel proffer a legal argument which:

1) was not previously adhered to by the Board in the instant case;

2) is contrary to the legal argument made by General Counsel in his Brief to and at oral argument before the Court of Appeals; and

3) is directly at odds with the legal standard adopted and relied upon by the Second Circuit.

The gravamen of Petitioner's contentions before this honorable body, the Court below and the National Labor Relations Board is that the "balancing" of the respective wrongdoings of an employer and a union is not a proper standard by which to determine whether an otherwise appropriate bargaining order should be withheld.

1) *The Board Applied a Balancing Test.*

The National Labor Relations Board conferred the benefit of a remedial bargaining order upon a union which had engaged in serious strike misconduct ". . . while recognizing that the matter . . . [was] not altogether free from doubt. . . ." (Pet. Appendix C, p. 23a). A plain reading of the Board's Decision (Pet. Appendix C, p. 22a-24a) reveals that the Board did, in fact, "balance" the comparative wrongdoings of the employer and the union in reaching its conclusion not to withhold a bargaining order.

2) *General Counsel in Its Brief Acknowledged That the Board Had Balanced.*

In its Brief to the Second Circuit, relevant sections of which are annexed hereto, the General Counsel stated that the Board had utilized a "balancing" test.

> "Here, however, the Company contends that the strike misconduct forecloses such a remedy. But under all the circumstances here, the Board found that the strike misconduct, though not to be condoned, did not *on*

> *balance* require withholding of a remedial bargaining order. . . ." (G. C. Brief to the Court of Appeals at p. 33). (Emphasis added)

General Counsel further stated:

> "The Company's contention . . . that the Board could not, in reaching its decision, *weigh* both the effect of the employer's unfair labor practices on the election process and the gravity of the union's misconduct is *clearly wrong*. . . ." (G. C. Brief to the Court of Appeals at p. 37, footnote 26). (Emphasis added)

3) *The Balancing Test Was Carried Forward in Oral Argument Before the Second Circuit.*

Moreover, in oral argument before the Court of Appeals, Counsel for the General Counsel stated that the Board had "balanced" the Union's misconduct against that of the Employer.

4) *The Second Circuit Adopted the Balancing Test.*

In enforcing the Board's order, the Court of Appeals, without explication and in apparent reliance upon the argument proffered by General Counsel, sanctioned the Board's use of a "balancing test":

> ". . . [the Board] *balanced the Union's illegal activities during the strike against the Company's actions both before and after the strike, measuring, as was its duty, the effect of the Company's violations against the gravity of the Union's misconduct in deciding whether a bargaining order was appropriate.*" (Pet. Appendix A, p. 10a). (Emphasis added)

• • • •

"The excesses by the union in the course of its strike were unwarranted and illegal. . . . But we simply cannot find, *on balance,* that the union activity should foreclose the issuance of this bargaining order." (Pet. Appendix A, pp. 12a-13a). (Emphasis added)

• • • •

"The fashioning of remedies is particularly difficult where, as here, *the legal standard to be applied involves a balancing test* and both sides are shown to have been guilty of misconduct. Ultimately the collective facts when sorted and collated show the Company to be the more guilty party. . . ." (Pet. Appendix A, p. 13a). (Emphasis added)

5) *The Solicitor General and General Counsel Now Abandon the Balancing Test.*

Before this Court, however, the Solicitor General and the General Counsel now assert that the Board conducted a proper *Gissel* inquiry and did not engage in a superficial "balancing" test in determining whether an otherwise appropriate bargaining order should be withheld (Board's Brief in Opposition, p. 7, footnote 5). General Counsel's "bootstrap" argument is belied by the record herein. Indeed, and most importantly—the opinion of the Court of Appeals, affirming the Board's Decision and Order, and on which the Petitioner has applied for a Writ of Certiorari is, without question, predicated upon a legal standard involving a "balancing" test. Therefore, General Counsel and the Solicitor General have raised for the first time in their Brief in Opposition a legal argument which departs from the legal standard previously applied by the Board herein and adopted by the Court of Appeals. This attempt to change legal standards is manifestly improper.

Moreover, this change in legal standard is an obvious attempt to mislead this Court into thinking that a proper standard was applied at all stages of this proceeding, and that the Petition merely seeks to have this Court review the findings of fact made by the Second Circuit. The fundamental issue before this Court is the propriety of the balancing test which was clearly applied by the Board and the Court of Appeals. It is obvious from this attempt that General Counsel and the Solicitor General now feel that balancing is an improper standard and cannot be sustained. At the very least, the Respondent's abandonment of its prior standard further warrants the granting of the Writ of Certiorari.

The Brief in Opposition does not address the legal issues raised by the Petition and should therefore be disregarded by this Court.

WHEREFORE, the Petitioner respectfully prays that this Court issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Dated: December 22, 1975

Pages 33 and 37 of General Counsel's Brief to the Court of Appeals for the Second Circuit

Here, however, the Company contends that the strike misconduct forecloses such a remedy. But under all the circumstances here, the Board found that the strike misconduct, though not to be condoned, did not on balance require withholding of a remedial bargaining order customary under the principles of *Gissel* to remedy the Company's pervasive and prolonged unfair labor practices of the character here involved. Considering both the relatively limited extent of employee misconduct and the fact that the Union's misconduct had been made the subject of a consent Board order enforced by a judgment of this Court, the Board concluded that "the extraordinary sanction of withholding an otherwise appropriate remedial bargaining order would not best effectuate the policies of the Act" (A. 268A). It reasoned that to deny these employees [sic] the rights normally attendant upon their designation of a majority representative when the holding a free election has been made impossible by the Company's own unlawful acts would leave the employees without any effective means of exercising their rights under the Act and at the same time reward the Company for its own wrongdoing (*ibid.*). Indeed, it would permit the Company to evade its statutory duty to deal with the representative which a majority of its employees had freely chosen even in the face of intense unlawful Company opposition. Thus, the end result would be to enable the Company to achieve the precise object of the campaign of coercion which it conducted.

Further, with regard to the strike misconduct, the Board found that, viewed in the perspective of the 4-month-long strike and the Company's frequent and recurring unfair labor practices, "there were but few instances of misconduct by a relatively small proportion of strikers" (A. 268A). Accordingly, it declined "to deprive a substantial group of employees of the benefits of collective bargaining because of the misconduct of a few miscreants" (*ibid.*).

748 (C.A. 6, 1972).[26] Cf., *N.L.R.B.* v. *Staub Cleaners Inc.*, 418 F.2d 1086, 1089 (C.A. 2, 1969); *N.L.R.B.* v. *International Metal Specialties, Inc.*, 433 F.2d 870, 872 (C.A. 2, 1970), cert. denied, 402 U.S. 907; *MPC Restaurant Corp.* v. *N.L.R.B., supra,* 481 F.2d at 79.

A contrary conclusion is not dictated by this Court's decisions in either *N.L.R.B.* v. *United Mineral & Chemical Corporation,* 391 F.2d 829, 838-841 (C.A. 2, 1968) or *N.L.R.B.* v. *World Carpets of New York, Inc., supra.* In both these cases, this Court refused to sanction a bargaining order where the employer's unfair labor practices were minimal and the union had committed strike violence in support of a demand to be recognized. (*World Carpets,* at 62; *United Mineral* at 838). In neither case, however, did the Court foreclose the Board from issuing a bargaining order despite a union's misconduct, where, as here, the employer's unfair labor practices are so serious that "a prompt and fair means of freely determining majority status has been effectively foreclosed . . ." (A. 269A). Rather, the Court in *United Mineral* observed that "arguably, a union's resort to serious violence to enforce its demands might be disregarded . . . when the employer's conduct has rendered a fair election impossible." 391 F.2d at 841; cf. *World Carpets, supra,* 463 F.2d at 62. The choice to enter a bargaining order in all the circumstances here therefore is a reasonable one, especially since, as both this Court and the Board have recognized, "the employees right to choose their representative survives the Union's misconduct." *United Mineral, supra,* 391 F.2d at 841 n. 17 quoting *Laura Modes Company,* 144 NLRB 1592,

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[26] The Company's contention (Br. 69-71) that the Board could not, in reaching its decision, weigh both the effect of the employer's unfair labor practices on the election process and the gravity of the Union's misconduct is clearly wrong. *N.L.R.B.* v. *World Carpets of New York, Inc., supra,* 463 F.2d at 62 (1972).